91-495

No. _____

In the Supreme Court of the United States

October Term, 1991

WORLDWIDE CHURCH OF GOD; LEROY NEFF, as Executor of the Estate of HERBERT W. ARMSTRONG; RAYMOND McNAIR; and RODERICK C. MEREDITH,

Petitioners,

v.

LEONA McNAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF APPENDICES

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FIVE

LEONA McNAIR, Plaintiff and Appellant, v. WORLDWIDE CHURCH OF GOD; LEROY NEFF, as Executor of the Estate of HERBERT W. ARMSTRONG; RAYMOND McNAIR; and RODERICK C. MEREDITH, Defendants and Respondents.	2d Civil B039651 (Super. Ct. No. NEC 27381)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard A. Lavine, Judge. Reversed.

Paul & Stuart, Antony Stuart; Mandell, Lewis & Goldberg, Michael L. Goldberg for Plaintiff and Appellant.

Haight, Brown & Bonesteel, Roy G. Weatherup, Bruce A. Armstrong; Ralph K. Helge & Associates, Ralph K. Helge, Jeffrey A. Lowery for Defendant and Respondent Worldwide Church of God.

Browne & Woods; Horvitz & Levy, Ellis J. Horvitz, Daniel J. Gonzalez for Defendants and Respondents Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, Raymond McNair and Roderick C. Meredith.

APPENDIX A

I. INTRODUCTION

Plaintiff Leona McNair (plaintiff) appeals from a summary judgment pursuant to Code of Civil Procedure section 437c[1] in favor of defendants Worldwide Church of God (the church), Dr. Roderick Meredith (Meredith), her former husband Dr. Raymond McNair (McNair), and Leroy Neff (Neff) as executor of the estate of Herbert W. Armstrong. Because the superior court judge incorrectly determined that there was no triable issue of material fact, the judgment is reversed.

II. UNDERLYING FACTS

The underlying facts are set forth in detail in *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 366-372, and need not be repeated here. To summarize, plaintiff was the ex-wife of McNair who, during the majority of their 20-year marriage, was a high-ranking "evangelist-minister" of the church. The church sanctioned the McNair's divorce from plaintiff under a newly adopted ground for divorce, " 'desertion by the unconverted mate.' " (*Id.* at p. 367.) This action contributed to confusion among church members as to the permissible grounds for divorce. The allegedly defamatory comments upon which plaintiff's lawsuit was based were made by Meredith, then director of pastoral administration for the church, as he attempted to clarify the church's position concerning divorce.

III. THE OPERATIVE COMPLAINT

Plaintiff's second amended complaint is the operative pleading. Plaintiff alleged causes of action for libel, slander per se, intentional infliction of severe emotional

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[1] All future statutory references are to the Code of Civil Procedure.

distress, invasion of privacy and civil conspiracy.[2] Those causes of action were based upon the allegations that defendants published a "Pastor's Report" containing the untrue statements that plaintiff had "refused to sleep with her husband for over two years, to cook for her husband for over two years, and had deserted her husband." Plaintiff also alleged that Meredith had spoken the following defamatory words at a "ministerial conference": " 'Most of you know the situation with Mr. McNair, but I just want to say . . . I personally know about it . . . When his first wife [plaintiff] left the Church, she was literally cursing him and cursing Mr. Armstrong—literally spitting in people's faces and as hateful as a human being could be.' [¶] 'She departed so far as to be one of the major enemies of God's Church in Southern California.' [¶] 'After about two solid years

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[2]Defendants' motion for summary judgment focused on the question whether defendant Meredith had acted with constitutional malice. Our use of the term "constitutional malice" refers to the state of mind that must exist in order to impose civil liability for defamatory statements made concerning a public figure as that term was defined in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280. In that case, the Supreme Court held that the First Amendment protects any defamatory statements made about a public figure unless clear and convincing evidence indicates that they were uttered with knowledge of their falsity or with a reckless disregard for the truth. (*Ibid.*) Plaintiff's causes of action for intentional infliction of severe emotional distress, invasion of privacy, and civil conspiracy were based upon the same facts as her causes of action for libel and slander. As will be discussed, in the event that plaintiff failed to show a triable issue of fact as to constitutional malice, her causes of action for libel and slander would fail. Moreover, in the event of such failure to show a triable issue of fact as to constitutional malice, plaintiff's causes of action for intentional infliction of severe emotional distress, invasion of privacy, and civil conspiracy would also fail. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265.)

of living without a wife in a virtual hell on earth, Mr. McNair was encouraged by Herbert Armstrong to put her away and divorce her because she just wanted to keep him (Mr. McNair) on a string and get a free ride while she cursed him.' " Plaintiff alleged that defendants were agents and employees of each other, and that defendants had conspired to defame her.

IV. MCNAIR I

In *McNair I*, this court balanced "the reputational interest of our citizenry against the interests protected by the First Amendment's free exercise of religion clause [fn. omitted]" (*McNair v. Worldwide Church of God, supra*, 197 Cal.App.3d at p. 375) and concluded that "in order for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, he/she must show, by clear and convincing evidence, that the defamation was made with constitutional malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.* at p. 377.) Further, "[w]hether a plaintiff is a 'public figure' or the method of publication is via a 'newspaper' is irrelevant under this holding." (*Ibid.*)

In *McNair I*, the jury had not been instructed that it must find constitutional malice. Rather, the jury had been instructed that it must find "actual malice" in order for plaintiff to prevail. "Actual malice" was defined as " 'a state of mind,' " specifically, " 'actual hatred or ill will by the defendant against the plaintiff which induces publication.' " (*Id.* at p. 378.) The jury had been further instructed that " '[i]n deciding whether the statements published were true or false, you may not consider whether the defendants believed the statements were true. You must only consider whether or not the statements

were objectively false.' [Fn. omitted.]" (*Id.* at p. 378.)

This court reviewed the record independently (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842, quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 510-511) to determine whether there was clear and convincing evidence at trial of constitutional malice and found that the evidence was insufficient. (*McNair v. Worldwide Church of God, supra,* 197 Cal.App.3d at pp. 378-379). Accordingly, the judgment in favor of plaintiff was reversed and this case was remanded for a new trial. (*Id.* at p. 380.)

At this point, it is appropriate to focus on a very confusing aspect of our decision in the *McNair I.* It can be intelligently argued that our colleagues who issued *McNair I* concluded, as a matter of law, plaintiff was not entitled to any recovery because the defamatory statements were privileged under the First Amendment Free Exercise Clause. For example, as noted previously, at one point the court concluded: "In First Amendment media cases, the role of the appellate court is to review the record independently to decide whether '. . . the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."[Citations.]'[Citations.] In this case, the record does not support a finding by us that respondent presented evidence which crossed this 'constitutional threshold.' " (*Id.* at pp. 378-379.) This language is consistent with the conclusion that under no circumstances could plaintiff recover and that all of defendants' conduct was constitutionally protected.

On the other hand, it can be argued that *McNair I* was a decision which reversed the judgment because of prejudicial instructional error. At one point, the court

identified the manner in which the instructions were in error. (*Id.* at p. 378.) Also, the court resolved a statute of limitations question adversely to defendants. (*Id.* at pp. 379-380.) Had it determined as a matter of law that plaintiff could never recover, then no purpose would be served by resolving the statute of limitations issue. The *McNair I* court declined to resolve other issues raised by defendants. (*Id.* at p. 380.) Finally, in *McNair I*, the court remanded the case "for a new trial consistent with the requirements of this opinion." (*Id.* at p. 380.)

These two varying interpretations of *McNair I* are, with all candor, intellectually and legally irreconcilable. However, given the specific order to hold a new trial, we construe *McNair I* in the following fashion. The opinion stands for the proposition that the jury was not properly instructed concerning the constitutional malice issue. (*Id.* at p. 378.) Furthermore, because of the specific order directing the holding of a new trial, the vague language which states that "the record does not support a finding by us that respondent presented evidence which crossed this 'constitutional threshold[ ]' " (*Id.* at p. 379) did not constitute an appellate court determination that Meredith's statements were constitutionally privileged as a matter of law.

Our decision in this regard is corroborated by the fact that none of the defendants in *McNair I* argued to this court that, as a matter of law, all of McNair's statements were protected by the constitutional malice rule provided for by the First Amendment and further all defendants were entitled to a reversal and entry of

judgment in the trial court in their favor.[3] We have judicially noticed the briefs, petitions, and oppositions, as well as the record filed in *McNair I* in this and our Supreme Court. *(Harris v. Industrial Acc. Com.* (1928) 204 Cal. 432, 438; *Moore v. Superior Court* (1970) 13 Cal.App.3d 869, 874.) None of the defendants contended that McNair's defamatory statements were constitutionally privileged because of the constitutional malice issue as a matter of law. Accordingly, the language in *McNair I* which indicated that plaintiff had failed to present evidence of constitutional malice so as to cross the "constitutional threshold" thereby precluding a judgment for plaintiff *(McNair v. Worldwide Church of God, supra,* 197 Cal.App.3d at p. 379), was not in response to any issue present before the court concerning insufficiency of the evidence of constitutional malice and constituted dicta. In *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, the Supreme Court held, "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." Similarly, in *Achen v. Pepsi-Cola Bottling Co.* (1951) 105 Cal.App.2d 113, 125, the Court of Appeal concluded: "[General] expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not control the judgment

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[3]At oral argument, counsel for McNair and Meredith argued that this issue had been raised in *McNair I.* However, McNair and Meredith did not contend that the absence of evidence of constitutional malice as a matter of law required that the superior court enter judgments on remand in their favor. Rather, they contended that Meredith's statements were constitutionally protected statements of opinion. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601.)

in a subsequent suit when the very point is presented for decision." Sound analysis concerning our decision in *McNair I* appeared in the answer to the petition for review filed by the church. The church's attorneys stated to the Supreme Court: "The court presumably based its decision to remand on the theory that the case was not tried on a theory of constitutional malice, and that plaintiff should be given the opportunity to do so." Based upon these collective considerations, we determine that our prior decision in *McNair I* was a case where the judgment was reversed because of prejudicial instructional error only.[4]

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[4]The present case is distinguished from the recent decision of the First District Court of Appeal, *McCoy v. The Hearst Corporation* (March 1, 1991, A045724) ___ Cal.App.3d ___. In *McCoy*, the Court of Appeal held that an unqualified reversal by the California Supreme Court of a judgment for several defamation plaintiffs in a First Amendment case because insufficient evidence of constitutional malice was presented at a jury trial barred retrial. In *McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 873, the Supreme Court entered the following disposition, "The judgment of the Court of Appeal is reversed with directions to reverse the judgment of the trial court." Unlike *McCoy*, our prior decision in *McNair I* was not an unqualified reversal. There had been prejudicial instructional error and we ordered that a new trial be conducted. Furthermore, as properly conceded at oral argument in this appeal by the church's counsel, in *McNair I* we remanded the case for a new trial because the first trial had not been conducted on the theory that Meredith acted with constitutional malice. In *McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 872, fn.37, the jury was instructed pursuant to the constitutional malice standard and the case was tried on that theory. Finally, in *McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 861, the issue of the presence of constitutional malice was squarely raised by the journalists and their newspaper. In *McNair I*, no party contended that the judgment must be reversed because there was insufficient evidence of constitutional malice. Therefore, the decision of March 1, 1991, by the First District does not require that we affirm the summary judgment in this case.

V. THE SUMMARY JUDGMENT MOTION

A. Standard of Review

A motion for summary judgment will be granted if the moving papers establish that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).) The standard for appellate review of a summary judgment motion was set forth by our Supreme Court as follows: "Summary judgment is a drastic measure that deprives the losing party of a trial on the merits. [Citation.] It should therefore be used with caution, so that it does not become a substitute for trial. [Citation.] The affidavits of the moving party should be strictly construed, and those of the opponent literally construed. [Citation.] Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. [Citation.] [¶] A defendant is entitled to the summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.] To succeed, the defendant must conclusively negate a necessary element of the plaintiff's case, and demonstrate that under no hypothesis is there a material issue of fact that requires that process of a trial." *(Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) An appellate court determines de novo if there is a genuine issue of material fact and whether the moving party was entitled to summary judgment as a matter of law. (*Wilson v. Blue Cross of So. California* (1990) 222 Cal.3d 660, 670.)

Because the present case involves First Amendment considerations, this court must apply the special test for determining whether there are triable issues as to the question of constitutional malice. In *Reader's Digest Assn. v. Superior court, supra,* 37 Cal.3d at p. 252, the

Supreme Court held: "We recognize a potential chilling effect from protracted litigation as well as a public interest in resolving defamation cases promptly. That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issue unless it appears that actual malice may be proved at trial by clear and convincing evidence—i.e., evidence sufficient to permit a trier of fact to find for the plaintiff and for an appellate court to determine that the resulting judgment " 'does not constitute a forbidden intrusion on the field of free expression' " [citation]. To this extent, therefore, summary judgment remains a 'favored' remedy in defamation cases involving the issue of 'actual malice' under the *New York Times* [*v. Sullivan* (1964) 376 U.S. 254, 279-280] standard." In *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 255, a case decided subsequent to *Reader's Digest Assn.*, the United States Supreme Court held: "Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [she or] he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to drawn in his [or her] favor. [Citation.] Neither do we suggest that the trial courts should act other than with caution in granting summary judgment . . . ." Later the court continued: "Consequently, when the *New York Times* [*v. Sullivan, supra,* 376 U.S. at

pp. 279-280] 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." (*Id.* at pp. 255-256.) Accordingly, in determining that triable issues exist, we have specifically decided based on the conflicting declarations that at the time of trial constitutional malice may potentially be proved by clear and convincing evidence.

B. The moving papers

The basis of defendants' motion was that the person who articulated the defamatory statements, Meredith, relied upon his own observations as well as those of others. As a result, defendants contended that the facts appearing in their separate statement were sufficient to prove as a matter of law that there was no triable issue as to whether constitutional malice could be proved at trial by clear and convincing evidence.

Defendants' separate statement sets forth seven "undisputed facts": (1) "[McNair], Joseph McNair, Bruce McNair, Michael Meredith and James Meredith all reported to [Meredith] that they had personally witnessed many or all of the examples of plaintiff's misconduct toward her husband and the Church which [Meredith] later mentioned at the ministerial conference and in the . . . *Pastor's Report*"; (2) "[Meredith] relied

upon the reports of the witnesses mentioned in Undisputed Fact (1) above, as well as other witnesses' reports, in formulating and publishing the oral and written statements at issue here"; (3) "[McNair], Joseph McNair, Michael Meredith and James Meredith were persons of unquestioned reputation for veracity in [Meredith's] mind at the time these individuals made the above-described reports"; (4) "The Worldwide Church of God, through its Pastor General, made an ecclesiastical determination that [McNair] was justified in divorcing his wife because her conduct toward both the Church and him constituted 'desertion by an unconverted mate' under the scriptural definition"; (5) "[Meredith] believes, as a matter of faith, that his Church's ecclesiastical determinations, including the one made in [McNair's] case are divinely inspired"; (6) "[Meredith] believed that his oral and written statements regarding [McNair's] divorce constituted a fair summary of the basis of the Church's ecclesiastical determination in [McNair's] case"; (7) "In making the statements at issue here, [Meredith] entertained no substantial doubt as to their truthfulness."

Defendants' motion for summary judgment was supported by: the declarations of Meredith; plaintiff's sons, R. Joseph McNair and Bruce D. McNair; Meredith's sons, James P. Meredith and Michael R. Meredith; and McNair. In his declaration, Meredith stated that at the time he made the statements concerning plaintiff he believed them to be true based upon his own observations of plaintiff's relationship with her husband. Also, Meredith relied upon statements made to him by his sons, plaintiff's sons, and McNair. Meredith set forth in his declaration that he was a close friend of McNair and during the relevant period of time had several visits with the McNairs in their home. Meredith

declared: "It was apparent to me that they were having considerable marital difficulties and that [plaintiff] was very bitter against the [church]. She began making very derogatory statements concerning the Church, Mr. Herbert Armstrong and Garner Ted Armstrong, who was at that time Executive Vice President of the Church, even in the presence of my two teenage sons." Meredith's sons spent "quite a bit of time" at the McNair's home and reported to Meredith that plaintiff "blew up at the husband and used words . . . such as 'damn' and 'hell,' referring to her husband, Herbert W. Armstrong, Garner Ted Armstrong and the [church]." Meredith's sons also reported to him that plaintiff and McNair were sleeping in separate rooms and that McNair "appeared to try to treat [plaintiff] very gently and kindly, but that she would never respond in any friendly or civil fashion, but only in a hostile and hateful manner." Meredith's sons also reported to him that plaintiff "wouldn't cook for [McNair] or even so much as bring him a cup of tea." Plaintiff expressed to Meredith her "bitterness" about "the church's teachings regarding remarriage, Pentecost, and perhaps other doctrines." Plaintiff called Meredith on the telephone and asked him to give a statement to a publication put out by "dissident former members and affiliates" of the church. Meredith was informed by others that plaintiff was attending meetings of a competing religious organization headed by a former minister of the church and that she was no longer attending church services. He was further informed by others that plaintiff had attempted to disrupt a church service and had demonstrated against the church with dissident former members of the church. In conclusion, Meredith stated that he based his belief in the truth of his statements on a number of factors including "my long friendship with [McNair] and the evidence I had

seen of his absolute honesty and integrity [which led] me to believe him when he told me of the reasons why his marriage was breaking up"; "eye witness [sic] accounts from my sons, who were over at the McNair home often while the marriage was breaking up"; eyewitness accounts from plaintiff's sons; "my own personal conversations with [plaintiff]; the reports I received from my wife after she had talked with [plaintiff] or visited her home; and the reports I received from many other longtime ministers and faithful members of the Church whom I knew to be honest and trustworthy."

The declaration of R. Joseph McNair, plaintiff's son, set forth the following: during the relevant period of time his mother "refused to be a wife to [defendant McNair]" and his parents slept in separate rooms; his mother refused to "civilly communicate" with his father and "would shout at him, try to provoke him and generally was very hostile to him"; plaintiff "refused to cook for [McNair]," and "became quite hostile toward the [church]"; plaintiff stopped attending church services and began attending religious services of a church founded by dissident former members of the church; plaintiff worked on and supported a publication put out by dissident former members of the church; he heard his mother say " 'Damn you' " to his father and "she began to take God's name in vain"; she acted "hatefully" toward his father. R. Joseph McNair also stated that he had discussed his parents' breakup with Meredith and with Meredith's son James. R. Joseph McNair stated, "I told [Meredith] of some of the most egregious examples I had observed of my mother's misbehavior . . . ." Bruce D. McNair's declaration is substantially the same as that of his brother. He did not, however, state that he had any communication with Meredith

concerning his parents' relationship.

The observations of James P. Meredith as set forth in his declaration in support of defendants' motion were as follows: plaintiff was "constantly demeaning, sarcastic, cynical and negative toward [McNair] both when speaking to him and speaking about him"; plaintiff referred to McNair on many occasions as a "stooge"; plaintiff would yell at McNair and once kicked McNair "without any provocation whatsoever"; plaintiff called McNair a " 'stupid jackass' " and "seemed to be hostile to him at all times"; plaintiff did not cook for McNair and the McNairs were sleeping in separate rooms; plaintiff was associating with former dissident members of the church, and had copies of that group's publication in her home; McNair was "paying all the bills" while plaintiff "bought virtually nothing" for the house. James P. Meredith stated that he related all of these observations and events to his father, Meredith. The declaration of Michael R. Meredith in support of defendants' motion for summary judgment is substantially the same as that of his brother, James P. Meredith. Michael R. Meredith stated that he related his observations of the McNairs' relationship to Meredith, his father.

The sixth declaration filed in support of defendants' motion was that of McNair. He stated that during the relevant period of time, plaintiff's attitude "became very negative toward the Church and toward me"; she began associating with dissident former members of the church, and she "became more and more hostile toward the [church] and toward me"; she subsequently refused to let McNair touch her "or show her any physical affection" and that he then began sleeping in a separate room; the atmosphere in the house became "unbearably

hostile." McNair discussed "the details of [his] marital difficulties" with Meredith "on several occasions during the period when [his] marriage was breaking up." Further, before Meredith published his statements concerning the plaintiff and McNair in the *Pastor's Report*, he showed McNair "a preliminary copy" and McNair told Meredith that he statements were "accurate."

C. The opposition

In her separate statement in opposition to defendants' motions for summary judgment, plaintiff disputed defendants' assertions of undisputed fact. As evidence, she relied on her own declaration and the declaration of her daughter, Ruth A. McNair-Knasin, stating in very general terms that "[t]hese declarations make clear that there was no 'misconduct toward her husband' on behalf of the plaintiff, and that Michael Meredith and James Meredith could not have personally witnessed such misconduct because they were not in the country during the period of time referenced in Meredith's defamatory remarks." In addition, plaintiff argued that the only evidence of Meredith's state of mind was his own declaration and therefore the trial court had discretion, pursuant to section 437c, subdivision (e), to deny the summary judgment motion. Plaintiff objected to any adjudication of "undisputed fact" number four on the ground that "[w]hether or not the Worldwide Church of God in fact made an ecclesiastical determination at any point in time is not a matter for resolution by courts of law."

Substantial portions of the declarations filed in opposition to defendants' summary judgment motion were ruled inadmissible by the trial judge. We have found no record of any objection to those rulings in the trial

court, nor has plaintiff raised any issue with respect to those rulings in her briefs on appeal. In the admissible portions of her declarations plaintiff stated that when defendant McNair filed for divorce from her, the Meredith family was living in England and that the Merediths did not visit the McNair home in Pasadena until "long *after*" plaintiff was served in the divorce action. She declared: "Obviously, the circumstance of not sharing meals or sleeping together is not unnatural for a couple wherein one of the parties had initiated divorce proceedings months earlier. Most couples do not share the same house after a divorce has been filed. However, I had no place to go and no money." Further, she declared, "The allegations that I refused to civilly communicate with my husband and refused to sleep with him are untrue to the extent that they make reference to that period of time prior to the date when [McNair] filed a petition for dissolution of marriage. . . . because it was not until *after* [McNair] had filed for a divorce that our relationship became so acrimonious that we did not sleep together, or eat meals with one another." She also stated, "The accusations of [Meredith] and his two sons that my husband and I did not share meals and slept apart led to the breakup of our marriage are totally false." Plaintiff said further, "I had not 'departed so far as to be one of the major enemies of God's Church in Southern California.' Rather I was a member of the [church] throughout the entire period of my marriage to [McNair]. . . . I had visited with [the dissident] group on only a few occasions. . . . [¶] The only thing I ever did which might have been considered antagonistic to the church was to state my own personal belief to my husband that the church was corrupt in its financial dealings and that it was carrying on acts of immorality within the upper echelons of the ministerial hierarchy."

Plaintiff's declaration noted that she used her own income from work to "help myself as much as I possibly could, and to buy groceries for my family." Plaintiff stated the "[a]ccusations that I spat and swore at my husband were totally untrue. It has never been my practice to use swear words. I did not disparage either my husband or the [church] in front of my children."

In the admissible portions of her declaration plaintiff's daughter, Ruth A. McNair-Knasin, stated, "The allegations that my mother refused to cook for my father before the divorce action are partially true. . . ." Also, she stated that McNair's divorce from plaintiff was one of the first marital dissolutions sanctioned by the church and that McNair would not have secured the termination of the marriage contract without the consent of his peers. Hence, she decided that McNair had "aggravated" and "dramatize[d]" the marital problems so as to secure church approval of the dissolution.

VI. ISSUES ON APPEAL

Plaintiff raises five issues on appeal. First, plaintiff contends that it was an error of law to view summary judgment as a "favored remedy" in this case. Second, plaintiff argues that under *McNair I* it is the law of the case that the evidence was insufficient to warrant a judgment in defendants' favor. Since defendants offered no evidence in support of their motion for summary judgment that had not been offered at trial it was an error of law to grant summary judgment in their favor. Third, plaintiff asserts that it was an abuse of discretion to grant summary judgment "solely" on the basis of defendant Meredith's declaration that at the time he made the statements at issue he believed

them to be true.[5] Fourth, plaintiff contends that *McNair I* was wrongly decided, and that subsequent decisions of the California Supreme Court and of the United States Supreme Court call into question the continuing validity of *McNair I.* Finally, plaintiff contends that a triable issue exists as to whether constitutional malice existed when the defamatory statements were made.

VII. DISCUSSION

A. Summary judgment is a "favored remedy" in this case.

As previously noted, a summary judgment motion in a First Amendment case is a "favored remedy." *(Reader's Digest v. Superior Court, supra,* 37 Cal.3d at pp. 251-252.) Plaintiff cites *Molko v. Holy Spirit Assn., supra,* 46 Cal.3d at p. 1107, fn. 9, as standing for the proposition that summary judgment is *not* a "favored remedy" in cases involving the free exercise of religion. Plaintiff has misread that case. In *Molko,* an action was brought against a religious organization, for fraud, intentional infliction of severe emotional distress, and false imprisonment. No cause of action was brought in *Molko* which required a finding of constitutional malice. Accordingly, the Supreme Court declined to apply the elevated standard: "As we stated in *Reader's Digest,* the higher standard for summary judgment in defamation cases is necessary because a verdict in such actions requires that actual malice be shown by clear and convincing evidence. [Citation.] No such necessity exists here." (*Ibid.*) As will be noted, we will apply the "favored

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[5]Because we determine that a triable issue existed as to the presence of constitutional malice, we need not address plaintiff's argument that the trial court abused its discretion in evaluating Meredith's state of mind.

remedy" analysis in determining that the summary judgment motion should have been denied.

B. *McNair I* does not require that summary judgment be denied.

Plaintiff contends that under *McNair I,* it is the law of the case that the evidence in the record of the first trial was insufficient to warrant a judgment in defendants' favor, and since defendants offered no evidence in support of their motion for summary judgment that had not been offered at trial, it was an error of law to grant summary judgment in their favor. This argument misconstrues the effect of *McNair I.* As we have previously noted, the prior reversal was premised on prejudicial instructional error. This court never stated that the evidence was such that the evidence was insufficient to support a defense verdict.

C. *McNair I* governs this case.

The fourth contention on appeal is that *McNair I* was wrongly decided, and that subsequent decisions of the California Supreme Court and the United States Supreme Court call into question the continuing validity of *McNair I.* Even if *McNair I* was wrongly decided, the law of the case doctrine prevents this court from now articulating a rule of law in conflict with that set forth in *McNair I.* As the Supreme Court stated in *Tally v. Ganahl* (1907) 151 Cal. 418, 421, "The doctrine of the law of the case is this: That where, upon an appeal, the [appellate] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and . . . in any subsequent suit for the same

cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." The principle applies to decisions of the Court of Appeal as well as the Supreme Court. *(People v. Shuey* (1975) 13 Cal.3d 835, 841-842; *United Dredging Co. v. Industrial Acc. Com.* (1930) 208 Cal. 705, 712.) The principle established in *McNair I* was necessary to the decision and is the law of this case.

The law of the case doctrine must be adhered to so long as it does not result in an "unjust decision." *(Pigeon Point Ranch, Inc. v. Perot* (1963) 59 Cal.2d 227, 231.) The "unjust decision" exception operates only where a party demonstrates, at a minimum, "a manifest misapplication of existing principles resulting in substantial injustice." *(People v. Shuey, supra,* 13 Cal.3d at p. 846; *People v. Ghent* (1987) 43 Cal.3d 739, 759.) No such showing has been made in the present case.

Moreover, no subsequent decision of the California Supreme Court or of the Untied States Supreme Court requires that we reject the principle articulated in *McNair I.* This court expressly limited the decision in *McNair I* to the facts presented: "Our opinion is based on the unique facts of this case that involve a former well-known and important member of the church [plaintiff] in a controversy that raises questions concerning church doctrine and teachings. We are not saying that explanation of church doctrine per se can shield the speaker or writer from a negligence action for libel or slander. There certainly must be a nexus between the person allegedly slandered or libeled and the religious activity involved. Accordingly, any determination of the malice required must be decided on a case by case basis." (*McNair v. Worldwide Church of God, supra,* 197

Cal.App.3d at p. 378, fn. 13.) *McNair I* has not been overruled in subsequent decisions, either explicitly or implicitly, nor has it been criticized. The cases cited by plaintiff did not concern the same unique facts as those present in this case and did not address the precise legal issue decided in *McNair I*. Accordingly, *McNair I* states the law applicable to the present case.

D. The trial court incorrectly determined that there was no triable issue of fact.

The declarations filed in support of defendants' motion for summary judgment negatived the assertion that Meredith knew his statements were false at the time he made them or he acted with reckless disregard of whether they were false. As a result, the burden shifted to plaintiff to raise a triable issue as to whether clear and convincing evidence was present on the issue of the existence of constitutional malice. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111.) In her declarations filed in opposition to defendants' motion, plaintiff denied that material portions of defendants' declarations were true. She denied that she had " 'departed so far as to be one of the major enemies of [the church] in Southern California,' " claiming instead the she remained a member of the church throughout her marriage to McNair and that she attended meetings with dissident former members of the church "on only a few occasions"; she denied that she " 'just wanted to keep [defendant McNair] on a string and get a free ride,' " claiming that she "used [her] own income from [her] work as [a] nurse to help [herself] as much as [she] could, and to buy

groceries for [her] family." She denied that she "cursed" her husband and others. She stated, "Accusations that I spat and swore at my husband were totally untrue. It has never been my practice to use swear words." She denied that her refusal to cook for and share a bedroom with her husband contributed to the breakup of their marriage. Her declaration stated, "[I]t was not until *after* [McNair] had filed for a divorce that our relationship became so acrimonious that we did not sleep together, or eat meals with one another." Because Meredith claimed his belief in the truth of his statements arose from his own observations and the observations of others as related to him, plaintiff's denial of the truth of those statements raised a reasonable inference that the declarations filed in support of defendants' motions were false.

The conflict in the declarations was sufficient to create a triable issue as to the existence of constitutional malice in the present case. Meredith claimed that he relied not only upon information given to him by plaintiff's sons, his own sons, and McNair, as well as others, but he also relied upon his own observations and conversations with plaintiff. In a jury trial, if the jury believed plaintiff, it could reasonably conclude that Meredith falsely testified about the basis for his statements concerning McNair's divorce from plaintiff. The jurors would normally be instructed pursuant to BAJI No. 2.20 which states that they are the sole and exclusive judges of the

believability of witnesses.[6] Additionally, the jury would be instructed pursuant to BAJI No. 2.22 which states that a jury is free to disregard the testimony of a witness who has testified falsely.[7] If a trier of fact disbelieved Meredith as to his claimed observations of plaintiff's relationship with McNair, then it would be free to disregard Meredith's testimony in its entirety. The same is true as to the testimony of the remaining defense witnesses. Moreover, plaintiff's daughter's declaration states that this was one of the first divorces approved by church leaders. This constitutes a motive for the church leaders to protect McNair, a fellow senior member of the church leadership. Further corroborating plaintiff's denial of the validity of the defense declarations was the fact that Meredith and McNair were

[6]BAJI No. 2.20 states: "You are the sole and exclusive judges of the believability of the witnesses. [¶ In determining the believability of a witness you may consider any matter that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to the following: [¶] The demeanor of the witness while testifying and the manner of testifying; [¶] The character of that testimony; [¶] The extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testified; [¶] The opportunity of the witness to perceive any matter about which the witness has testified; [¶] The character of the witness for honesty or veracity or their opposites; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] A statement previously made by the witness that is consistent with the testimony of the witness; [¶] A statement made by the witness that is inconsistent with any part of the testimony of the witness; [¶] The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony; [¶] An admission by the witness of untruthfulness."

[7]BAJI No. 2.22 states: "A witness false in one part of her [or her] testimony is to be distrusted in others. You may reject the entire testimony of a witness who wilfully has testified falsely on a material point, unless, from all the evidence, you believe that the probability of truth favors his [or her] testimony in other particulars."

close friends. This relationship provided a motive on Meredith's part to protect McNair among church members. Additionally, Meredith stated in his declaration that McNair's sons confirmed plaintiff's responsibility for the marital breakup. However, one of the McNair children, R. Joseph McNair, failed to state in his declaration the conversation alleged by Meredith ever occurred. If the jury concluded that Meredith and his witnesses were lying, then the trier of fact could reasonably conclude that Meredith either falsely made the statements or did so with a reckless disregard for the truth. This case represents the classic scenario of a factual dispute which should appropriately be resolved by trial.

Defendants' reliance on *McCoy v. Hearst Corp., supra,* 42 Cal.3d at pp. 841-873, for the proposition that plaintiff's denial of misconduct on her part did not raise a triable issue is unpersuasive. In *McCoy,* a newspaper printed false and defamatory allegations concerning two San Francisco police inspectors and an assistant District Attorney. A former prosecution witness claimed that he had been threatened and coerced to give false testimony concerning a confession by a defendant and that the prosecutor had provided him with a written statement containing the falsified confession which was to be memorized. (*Id.* at p. 841.) The reporters conducted a thorough investigation of the under oath allegations by the former prosecution witness. (*Id.* at p. 847-857.) The reporters had no personal knowledge of the truth of the defamatory matter. The California Supreme Court conducted an independent review of the jury trial testimony, concluded that there was not clear and convincing evidence of constitutional malice, and reversed the judgment. (*Id.* at p. 870-871, 873.) *McCoy* is materially different from the present case. First,

McCoy did not purport to change the rules applicable to appellate review of an order granting summary judgment in a First Amendment case enunciated in *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 252 and *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at p. 255. Second, in the present case, Meredith's declaration states that his defamatory allegations were based in part on his own personal observations. Plaintiff denied that there was a factual basis for any of Meredith's statements concerning the cause of the breakup of her marriage with McNair. In *McCoy,* neither of the two journalists claimed they observed the "threats, coercion, physical assault and promises of leniency" directed at the prosecution witness nor did either of the two reporters state that they saw the prosecutor give a written story which was to be memorized to the witness. (*Id.* at pp. 840-841.) In the present case, the credibility of Meredith, the person who uttered the defamatory statements, concerning what he says he observed will be an issue at the time of trial. Finally, unlike *McCoy,* there is evidence of a motive on the part of some of the persons Meredith talked to in forming his conclusions concerning plaintiff's conduct to protect McNair, a fellow church leader. In *McCoy,* there was no evidence of a motive on the journalist's part to falsely defame the plaintiffs.

To further complicate matters from defendants' perspective, the trial court's ruling was premised on an inaccurate assumption concerning *McNair I.* In its written order the court stated: "Hence I hold that the law of the case is that as far as the evidence produced at the trial is concerned, the law of the case is that such evidence was insufficient to constitute constitutional malice. Hence I must examine plaintiff's declarations or affidavits to see if she is able to respond to the challenge posed by this motion for summary judgment.

If there is competent new evidence, then the law of the case does not apply to such new competent evidence. If she is unable to present competent new evidence, then the law of the case applies, and I am bound by the holding of the appellate court." As we have previously noted in part IV of this opinion, *McNair I* was solely an instructional error case. The question of whether, as a matter of law, Meredith's statements were made without constitutional malice was not before this court. Additionally, as stated previously in this opinion, the court in *McNair I* ordered that a new trial be held.

The effect of the trial court's erroneous opinion concerning the application of the law of the case doctrine was substantial. To begin with, the trial court required plaintiff to produce additional evidence beyond that presented in the first trial. This court never made such an order. The issue of what would happen at a post-appeal summary judgment motion was neither raised nor resolved in *McNair I.*

Moreover, the trial court never applied the proper procedure when passing on a summary judgment motion. The evidence to be relied upon by the parties must be that contained in their separate statements. (§ 437c, subds. (a) & (b).) What occurred at a pre-appeal trial is generally, but not always, irrelevant to the summary judgment process. Moreover, at a summary judgment hearing, the court must first evaluate the moving party's evidence and, if it negatives an essential element of the responding party's case, then the court looks to the separate statement filed by the responding party to determine whether a triable issue exists. (*Rowland v. Christian, supra,* 69 Cal.2d at p. 111; *Cox v. State of California* (1970) 3 Cal.App.3d 301, 309.) In the present case, the court merely looked to our opinion in *McNair*

I and then examined the arguments and admissible portions of the declarations submitted on behalf of plaintiff to verify whether additional evidence was present on the constitutional malice issue.[8] This is not the proper procedure to follow in ruling on a summary judgment motion.[9]

To sum up, we determine the summary judgment motion should have been denied because a triable issue of material fact existed as to whether clear and convincing evidence was present that Meredith acted with constitutional malice as defined by the United States Supreme Court in *New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 280. We have applied the test for reviewing an order granting summary judgment in a First Amendment case set forth in *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 252 and have also separately applied the standard of review mandated by the decision of *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at 255-256. Further, the trial court misconstrued the nature of our holding in *McNair I* and did not properly apply the summary judgment law. We wish to emphasize that we have conducted a de novo review of the evidence cited to in the separate statements of the respective parties and our decision that a triable issue of material fact existed as to the constitutional malice question has been made entirely separate and apart from our determination that the trial

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[8]We realize that the trial court's error was due in part to the vague and uncertain language appearing in *McNair I.*

[9]In addition, the evidence presented at trial was not referred to by defendants in their separate statement. Therefore, even if the trial court's assumption concerning *McNair I*—that it required plaintiff to produce additional evidence beyond that presented at trial—was accurate, defendants' separate statement did not properly place that issue before the trial court.

court failed to properly apply the summary judgment law. Therefore, even if the trial court had correctly complied with the summary judgment procedure, our conclusion concerning the constitutional malice issue would remain the same. Hence, the summary judgment is reversed and the case is remanded for a new trial. We wish to emphasize that we envision that a jury or court trial will ensue in short order after the remittitur is filed if this case does not settle.

IX. DISPOSITION

The judgment in favor of defendants pursuant to Code of Civil Procedure section 437c entered on November 21, 1988, is reversed and the case is remanded for a trial. Plaintiff Leona McNair is to recover her costs on appeal jointly and severally from defendants Worldwide Church of God, Roderick Meredith, Raymond McNair and Leroy Neff as executor of the estate of Herbert W. Armstrong.

NOT TO BE PUBLISHED

TURNER, P.J.

We concur:

BOREN, J.

GRIGNON, J.

MCNAIR v. WORLDWIDE CHURCH OF GOD
197 Cal.App.3d 363; 242 Cal.Rptr. 823 [Dec. 1987]

[No. B010791. Second Dist., Div. Five. Dec. 30, 1987.]

LEONA McNAIR, Plaintiff and Respondent,
v. WORLDWIDE CHURCH OF GOD et al.,
Defendants and Appellants.

SUMMARY

Plaintiff brought a defamation action against a fundamentalist church and two of its ministers, one of whom was her ex-husband, and the other of whom made allegedly defamatory remarks about her to church members in the course of explaining a change in church doctrine regarding grounds for divorce and its application to the divorce of the plaintiff and her former husband. The trial court refused defendants' requested instructions on constitutional malice, and plaintiff won a jury verdict. (Superior Court of Los Angeles County, No. NEC 27381, Robert M. Olson, Judge.)

The Court of Appeal reversed, holding that the U.S. Const., 1st Amend., free exercise of religion guarantee is of equal significance to the guarantees of free speech and free press, and is entitled to the same degree of protection from state defamation law. In order to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, the court held, a plaintiff must show by clear and convincing evidence upon retrial that the defamation was made with constitutional malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Additionally, the court held that plaintiff had timely amended her complaint

to identify the individual defendants, who had been named fictitiously, within the period of the applicable statute of limitations after she became aware of the allegedly defamatory remarks. (Opinion by Hastings, J.,* with Feinerman, P.J., and Ashby, J., concurring.)

COUNSEL

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Antony Stuart and Michael L. Goldberg for Plaintiff and Respondent.

Browne & Woods, Horvitz, Levy & Amerian, Ellis J. Horvitz, Barry R. Levy, Daniel J. Gonzalez, Haight, Dickson, Brown & Bonesteel, Bruce A. Armstrong, Roy G. Weatherup, Robert M. Dato, and Ralph K. Helge for Defendants and Appellants.

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* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

OPINION

HASTINGS, J.*—In this case of first impression we are asked to determine whether the free exercise clause of the First Amendment of the United States Constitution bars a defamation suit brought against a church and two of its ministers for statements made during the course of a theological controversey. (*sic*) Should we find the suit is not barred, we then must identify the level of malice necessary to sustain an award of damages.

Plaintiff and respondent Leona McNair (respondent) brought an action for libel, slander, intentional infliction of severe emotional distress, invasion of privacy, and conspiracy against defendants and appellants Worldwide Church of God (the Church), Raymond McNair

(McNair), and Roderick Meredith (Meredith). After a jury trial, judgment was entered in respondent's favor. She was awarded $260,000 compensatory and $1 million punitive damages.

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* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

FACTS

To better understand the issues on appeal, we begin with a brief history of the Church. Herbert W. Armstrong founded the Church in 1933 when it was known as the Radio Church of God. The Church is a fundamentalist Christian faith with an hierarchical (*sic*) structure. Until his death in 1986, Mr. Armstrong was the Pastor General or Apostle and the spiritual leader of the Church. Below him in the leadership are a handful of evangelist ministers. Below the evangelists, in order of rank, are the pastors, elders, local elders and finally deacons. Guidance on matters of religious doctrine and administration is passed down from the leadership to the field ministry and congregation.

The Church's religious beliefs are rooted in the Old and New Testaments. Followers' lifestyles are determined by biblical strictures, e.g. observance of Sabbath on Saturdays, tithing, adherence to certain dietary laws. The Church also has strict views on the permanence of marriage, making divorce very difficult.

The Church membership numbers approximately 100,000 with 1,000 ministers. Much of the growth of the Church was due to the 1947 founding of Ambassador College in Pasadena, where the Church is headquartered and where most of the Church's ministers have been educated.

Raymond McNair became a Church evangelist-minister in 1953 and a leader of the Church. One of the persons McNair baptized was respondent. On July 31, 1955, they were married. Foregoing the nursing for which she had been trained, respondent assisted McNair and, in accordance with Church practice, became "50 percent of his ministry." In 1958 McNair was sent to England to manage the Church's work overseas. At Mr. Armstrong's behest, McNair opened an Ambassador College campus in England in 1960. He was the deputy chancellor of this college as well as the director of Church work for Europe, Africa, the Middle East, Asia and Australia. McNair was also regional editor of the Church's publications for which he wrote many articles. Assisting McNair in all his works and traveling extensively with him, respondent became known in the Church as the "first lady of England," corresponding to Mrs. Armstrong's status as "first lady in the Church."

All went well until 1973 when a Church division developed, pitting "conservatives" against "liberals." The latter group promoted changes which would liberalize various church teachings. Among several controversial issues was the Church's teaching on divorce and remarriage. Up to this time, the Church recognized only two grounds for divorce and permissible remarriage: porneia, defined as gross immorality, and fraud. Those divorced persons who wished to be baptized also had to abide by this teaching even if it meant leaving a new spouse. In 1974, a third ground was added: "desertion

by the unconverted mate."[1] Also, under the new doctrine, divorces prior to conversion into the faith were forgiven, regardless of the grounds for divorce.

McNair allied himself with the Church conservatives and fought against the various changes. In 1973, McNair returned to become deputy chancellor of Ambassador College in Pasadena. Because the "liberals" were on the ascendancy, McNair was demoted to the position of senior editor of the Church's main publication, Plain Truth.

Though McNair remained faithful to the Church, respondent became embittered by this treatment. Because McNair's demotion meant a cut in salary, respondent was concerned with the family financial situation. Unbeknownst to McNair, she began to investigate the possibility of reactivating her nursing license. As time passed, respondent became increasingly discontented with the Church and, what she perceived as, its hypocrisy. She began to attend meetings organized by a former Church minister who was similarly disgruntled, Ernest Martin. Respondent also financially contributed to and associated with the editors of Ambassador Review, a publication founded by former dissatisfied Church ministers and members. It featured articles critical of the Church's practices.

Eventually McNair learned about respondent's activities, and in 1974 he confronted her. After McNair's warnings, respondent continued to attend the Martin

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[1]The concept of desertion was derived from scripture, I Corinthians, chapter 7, verse 15, which provides that if a nonbeliever departs, one is no longer bound. If the nonbeliever was found "not pleased to dwell," a scriptural concept, the believer would no longer be bound to dwell with a nonbeliever in marriage.

meetings and to associate with the *Ambassador Review*. Their personal relationship deteriorated rapidly. McNair removed respondent from the checking account, temporarily denied respondent use of the family car, and told her he'd rather she not pursue her career plan. Respondent refused to acquiesce, and in January, 1975, McNair moved out of their bedroom. A brief unsuccessful attempt at reconciliation was made in April, 1975.

McNair, counseled by Herbert Armstrong, filed for divorce in June 1975. Respondent was served in July 1975. McNair remained living in the house until July 1976. The divorce became final in September 1976. In the eyes of the Church the grounds for the divorce were "desertion by the unconverted mate" (here, respondent). McNair was the only evangelist minister within the Church who had ever divorced.

McNair and respondent went their separate ways. Respondent regained her nursing license and worked as a private duty nurse. Their oldest child, Ruth, was an adult; she chose to live with respondent, as did their youngest child, Joe. Bruce, their third child and elder son, chose to live with McNair. In June 1977, McNair married Evelyn McNair, a church member. In 1977, McNair regained his seat on the Church's board of directors and, the following year, his appointment as deputy chancellor of Ambassador College.

The third individual involved in this suit is Roderick Meredith. Meredith and McNair attended Ambassador College together; he graduated in 1952, and also became an evangelist minister. In 1955, he presided over McNair's and respondent's marriage and later married McNair's sister. In 1960, he conducted a marriage counseling session between McNair and respondent. During her trial testimony, respondent described this

session as lasting four and a half hours and consisting of "railing accusations." McNair and Meredith both offered contradictory testimony.

At all times pertinent to this litigation, Meredith was director of pastoral administration for the Church. It was his responsibility to clarify doctrinal issues within the ministry around the world. He also counseled ministers who experienced personal problems.

As noted earlier, the Church's 1974 action changing the rules on divorce and remarriage had caused much controversy and discussion. A "profound lack of understanding" continued throughout the ministry for several years after the changes. The controversy heightened when the 1976 McNair divorce became known. This was so because both McNair and respondent had been Church members when they exchanged marriage vows; had lived together 20 years adhering to Church teachings; neither had walked out on the other; and both had enjoyed prominent positions in the Church. McNair's 1977 remarriage placed him in the center of the controversy. Had his divorce been improper he would be seen as living in adultery, and there would appear to be a "double standard."

Simultaneous with this controversy, the Church experienced further turmoil when our state Attorney General placed it under receivership in early 1979.[2] There was considerable controversy and publicity surrounding this action. Respondent was seen at one of the demonstrations organized by dissidents in the church, held near the Ambassador College campus. In early 1979,

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[2]This court later ruled the receivership had been unconstitutional and void. *(People ex rel. Deukmejian v. Worldwide Church of God, Inc.* (1981) 127 Cal.App.3d 547 [178 Cal.Rptr. 913].)

she and one of the persons involved in the Attorney General suit unsuccessfully attempted to enter a Church sabbath service. Meredith was aware of respondent's action and asked the congregation to consider respondent as a person who "was no longer with us," a Church practice known as "marking."[3] By letter dated February 12, 1979, respondent was informed of this action.

Against this backdrop, the Church's annual meeting of ministers, the Ministers' Conference, was held in Tucson, Arizona in January, 1979. There were approximately 1,000 in attendance: ministers, their wives, and support staff. The proceedings were videotaped.

Since the controversy regarding divorce and remarriage persisted, the subject was a topic of discussion during this conference. As director of pastoral administration, Meredith considered it his responsibility to address this issue. He was aware that some ministers in attendance were accusing him and McNair of hypocrisy in permitting McNair's divorce and remarriage. Meredith was concerned about an increase in the number of divorces and remarriages being allowed by ministers. With these concerns in mind, he rose to address the ministers. His speech, which lasted three and one-half hours, included the following remarks, which are the basis for the slander action.

"Mr. Raymond McNair's wife is also a newer wife in the ministry but has been in God's church I think twelve or fifteen years, something like that. And I think most of you know and I want to say this here. I don't

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[3]According to Meredith's testimony, "marking" is done before the local congregation; Church members are to avoid spiritual fellowship or contact with a "marked" person, who is seen as causing division within the Church.

think Raymond and Evelyn will mind; they might be a little embarrassed but Evelyn. . . had a husband that really mistreated her very much years ago. And this divorce was way back before [her] decision and that was way, way back, but most of you who know the situation with Mr. McNair, and I just want to say it because again there has been some scurrilous, foul garbage, we could use a wronger [*sic*] term, floating around to try to discredit him. But I personally know about it, not just from hearing him tell about it, but by being in his house during part of this time and my two sons playing with their cousins, not playing with, but visiting with and staying over weekends with their cousins Bruce and Joe when his first wife had left the church and was virtually cursing him, cursing Mr. Armstrong, with curse words, spitting literally in people's faces and as hateful as a human being could be. And God does tell us and the whole Church of God decided long before this ever came up with Mr. McNair back in First Corinthians 7:15 'But if the unbelieving depart,' and I tell you before God and Christ, she sure departed. I mean she departed so far that she is one of the major enemies of God's Church in Southern California and remains so to this day has been working actively and ferociously with the *Ambassador Review*. Tried to call me personally and get me to give them an interview here a year or so ago which I would not do. Everyone else that attends their meetings, attended Dr. Martin's meeting, fighting us, and fighting us actively. And 'if the unbelieving depart, let him depart. A brother or a sister is not under bondage. . .' or as the Greek word is used here, *luo*. I believe it is, the same word that is used for bound, in other words is not bound, is not *luo*, '. . . in such cases: but God has called us to peace,' and we've come to realize that what God has bound

he can unbind. That's part of our understanding on divorce and remarriage which the whole Church came to back in 1974. And so after about two solid years of living without a wife and a virtual hell on earth Mr. McNair was encouraged by Mr. Armstrong and by Garner Ted Armstrong,[4] and this is not a matter of a secret because he told me that he'd done that with Raymond and he told others, Ted Armstrong that is and Mr. Armstrong. Both encouraged Raymond to put her away and divorce her since she was just simply wanting to keep him on the string and get a free ride while she cursed him and would not have anything to do with him. There was not even a way of saying hello in a friendly way, living in opposite ends of the house in an armed truce or an armed hell, and the way to do was to put her away and do what First Corinthians 7:15 said on the advice of the two top men in God's work. And so he had done that after about a year and a half, or whatever, and finally, also, several months later, married his present wife. And he is not married to anyone else but his present wife according to the understanding God's Church came to back in 1974. Thank you very much. So I hope we can all understand that and not accept this garbage that is trying to be thrown at every leading man in God's Church in one way or the other by Satan, the devil, through those whom he would use. So anyway, I hope we understand that . . . ."

Apparently, these remarks did not completely clarify the Church's teachings. Ron Kelley, a Church evangelist who supervised ministers in the Rocky Mountain States,

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[4]At trial, Meredith conceded he had been misinformed about the Armstrongs' role in McNair's divorce. They counseled McNair a divorce would be permitted but did not encourage him.

wrote a two-page memorandum, entitled "Marriage & Divorce; A Greater Problem Than Ever." The memo was received at headquarters on June 19, 1979. In the third paragraph, Kelley noted, "No one has ever explained the Raymond McNair problem to the Church members. Many members simply cannot understand how such a long time 'leading' Minister and Evangelist can be free to remarry when the marriage occurred in the Church and lasted for more than 20 years." The memo discussed the overall divorce problem in the church and concluded, "This is a burning and nagging question within the Church and needs thorough doctrinal research and then official publication so members can know." This memo came to McNair's attention who discussed it with Meredith and other ministers. The outcome of these discussions was an article in the June 25, 1979, Pastor's Report, authored by Meredith.[5] It stated: "Now, fellow ministers, I would like to discuss something that is becoming an increasingly *critical problem* within the ministry and within God's Church as a whole—especially herein the United States. Increasing numbers of our church members are beginning to divorce their mates for, it seems, almost ANY conceivable reason! What's more, they then expect to 'remain in the Church' and probably REMARRY *someone else* in the Church—perhaps their former friend's wife who has, by now, divorced him, and is also 'still in the Church.'

"We are going to have long doctrinal and theological discussions with Mr. Herbert Armstrong to cover and thoroughly understand any *legitimate* reasons for

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[5]The Pastor's Report is a private, weekly publication by the Church for its full-time ministers and a few others, such as Ambassador College faculty.

divorce and remarriage. *However,* as of this writing, there are only THREE that God's Church has officially recognized as legitimate: (I) *Porneia*—that is gross immorality involving unadmitted fornication before marriage or a very *serious* or continuing type of adulterous or homosexual or similar relationship after marriage, (II) *Fraud*—this is the case where one is "tricked" in some way and we have *always* understood and recognized this as an action that would in fact 'annul' a marriage since God would never bind a union based on fraud in the first place, (III) *Desertion*—by the unconverted mate—although this was accepted and taught by the Church long before his action, a classic example of this would be Mr. Raymond McNair's situation. His wife *refused* to be a wife to him for over two years—to sleep with him, cook for him, or even *civilly* communicate with him in a decent manner. Rather, she had *left* God's Church and was actively FIGHTING God's Church *and Mr. McNair,* turning his children against him and literally *cursing* him to his face. Finally, upon advice of Mr. Armstrong *and* Ted Armstrong, he was finally forced to make legal the already existing FACT that she had *deserted him* and was no longer his wife *in any way whatsoever.*

"I repeat, these three exceptions are the ONLY ones recognized by God's Church as biblical reasons for people who are *already converted* to divorce a mate. Perhaps even we in the ministry need to realize more vividly the meaning of Jesus' statement: 'What therefore God hath joined together, *let no man put asunder.'* (Matt. 19:6.)" (Italics in original.)

Respondent learned about these statements in the Pastor's Report from a friend during a casual conversation at the supermarket. Subsequently, she heard the

tape of Meredith's speech at the Ministerial Conference. She was devastated, and her emotional distress manifested itself in several physical and mental disorders.

PROCEDURAL HISTORY

Respondent filed her original complaint on July 13, 1979. It alleged two causes of action for libel and intentional infliction of emotional distress, arising solely from the Pastor's Report. The Church, Ambassador International Foundation and the Ambassador College were named as defendants. On October 4, 1979, respondent's first amended complaint was filed; it added causes of action for invasion of privacy, slander per se and slander, arising out of Meredith's remarks at the 1979 Ministerial Conference. Respondent's second amended complaint, the operative one on appeal, was filed September 23, 1980, and named as additional defendants Meredith, McNair, Herbert Armstrong and other individuals. It added a cause of action for civil conspiracy.

Trial commenced on July 3, 1984. On August 23, 1984, after one day of deliberations, the jury returned a special verdict, in which it found the following:

1. The statements made at the ministerial conference and in the Pastor's Report were not privileged and were not true;

2. In making the statements in the Pastor's Report, defendants "intentionally caused, by extreme and outrageous conduct, severe emotional distress to plaintiff, or acted with reckless disregard of the probability of causing emotional distress to the plaintiff";

3. Plaintiff's severe emotional distress was a proximate result of the conduct of the defendants;

4. Defendants' wrongful acts were "done pursuant to a conspiracy to either libel, slander, or intentionally cause, by extreme and outrageous conduct, severe emotional distress to the plaintiff"; and plaintiff was damaged as a result of these acts;

5. The jury found in favor of plaintiff and against all three defendants.

THE APPEALS:

The Church, McNair and Meredith appeal. Each joins in the other's arguments. The Church argues reversal is mandated because the First Amendment of the United States Constitution bars this suit. We do not list or discuss numerous other issues raised because we decide this appeal on the constitutional issue.

In addition to the constitutional issue, McNair and Meredith contend respondent's action is barred by the statute of limitations.

DISCUSSION

(1) "State laws whether statutory or common law, including tort rules, constitute state action." *(Paul v. Watchtower Bible Tract Soc. of New York* (9th Cir. 1987) 819 F.2d 875, 880.) In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 265 [11 L.Ed.2d 686, 697, 84 S.Ct. 710, 95 A.L.R.2d 1412], the United States Supreme Court held that state libel laws are subject to First Amendment constraints. It follows that state slander laws are similarly constrained.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

government for a redress of grievances." The free exercise clause guarantees the protection of two concepts: freedom to believe and freedom to act. (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304 [84 L.Ed. 1213, 1219-1220, 60 S.Ct. 900, 128 A.L.R. 1352].) The freedom to believe is absolute. However, religious conduct may be subject to regulation for the protection of society. (*Ibid.*)[6] In order for a regulation, or burden to pass constitutional muster, the action to be regulated must pose some substantial threat to public safety, peace, or order. (*Sherbet v. Verner* (1963) 374 U.S. 398, 403 [10 L.Ed.2d 965, 970, 83 S.Ct. 1790].)

The instant appeal presents issues which concern the freedom to act in the exercise of one's religion. Numerous cases warn that " 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' " on this freedom. (*Sherbert v. Verner, supra,* at p.406 [10 L.Ed.2d at p.972], quoting *Thomas v. Collins* (1945) 323 U.S. 516, 530 [89 L.Ed. 430, 440, 65 S.Ct. 315].) Here, we are asked to determine whether protection of a person's good name is a sufficiently important state interest that we allow the burden of tort damages to be imposed upon the Church's and its evangelist ministers' action.[7] We conclude that it is, subject to the limitations discussed below.

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[6]Cases which have upheld a direct burden on religious practice are *Reynolds v. United States* (1878) 98 U.S. 145 [25 L.Ed. 244] (polygamy); and *Hill v. State* (1956) 38 Ala.App. 404 [88 So.2d 880] (snake handling); *Prince v. Massachusetts* (1943) 321 U.S. 158 [88 L.Ed.2d 645, 64 S.Ct. 438] (religious proselytizing by children on public streets.)

[7]Imposition of money damages is a burden upon religious action. (*Paul v. Watchtower Bible Soc. of New York, supra,* 819 F.2d at p. 882.)

(2) An individual's right to protect his/her good name has long been recognized. As one legal commentator has noted, "A millennium ago a slanderer could lose his tongue."[8] While today the consequences suffered by the defamer are not so drastic, there is no question that society continues to have ". . . a pervasive and strong interest in preventing and redressing attacks upon reputation." (*Rosenblatt v. Baer* (1966) 383 U.S. 75, 86 [15 L.Ed.2d 597, 605, 86 S.Ct. 669].) In *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749 [86 L.Ed.2d 593, 105 S.Ct. 2939], Justice Powell quoting *Rosenblatt, supra,* identified this interest as reflecting " ' ". . . no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." ' " *(Dun & Bradstreet, supra,* at p. 758 [86 L.Ed.2d at p. 601].) California has codified this interest in *Civil Code* sections 44 through 46. Section 44 provides that defamation can be effected through either libel or

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[8]Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer* (1975) Va.L.Rev. pp. 1349-1451, 1350.

slander, and sections 45 and 46 define these terms.[9] In *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835 [231 Cal.Rptr. 518, 727 P.2d 711], our Supreme Court acknowledged that "Society's interest in redressing the harm done one's reputation is strong." *(Id.* at p. 858.)

(3) In this case, we must balance the reputational interest of our citizenry against the interest protected by the First Amendment's free exercise of religion clause.[10] To resolve the issues raised by this balancing, we look not to common law theories of defamation which speak in terms of truth as a defense, privilege and qualified privilege.[11] These have grown ". . . into a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities." (Eaton, *supra,* at p. 1350;

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[9] *Civil Code* section 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation."

Civil Code section 46 provides: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [¶] 4. Imputes to him impotence or a want of chastity; or [¶] 5. Which, by natural consequence, causes actual damage."

[10] Doctrinal explanation by a duly authorized minister is as much an exercise of religion as any other religious practice.

[11] For a discussion of defamation and the free exercise clause, see Sciarrino, *"Free Exercise" Footsteps in the Defamation Forest: Are "New Religions" Lost?* (1983) *Am.J.Trial Adv.*, pages 57-121.

see also, Prosser, Law of Torts (4th ed.) Defamation, § 111, p. 737 et seq.) Instead, the analysis and theories set forth in *New York Times Co. v. Sullivan* (1964), *supra,* 376 U.S. 254, and its progeny are the foundation for our holding.[12]

In *New York Times Co. v. Sullivan, supra; Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997]; and *Dun & Bradstreet, supra,* 472 U.S. 749, the Supreme Court balanced the reputational interests of the plaintiff against the rights protected by the First Amendment's free speech and free press clauses. The plaintiff in the *New York Times* case was an elected official suing the *New York Times* over the contents of an advertisement printed in the paper. The court recognized that our country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *(New York Times, supra,* 376 U.S. at p. 270 [11 L.Ed.2d at p. 701].) The court concluded that the constitutional guarantees prohibit ". . . a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.* at pp. 279-280 [11 L.Ed.2d at p. 706]. This *New York Times* malice has

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[12]We are aware of *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791 [197 P.2d 713], affirming a jury verdict against a church, its pastor and members of its board of deacons for defamatory remarks made about plaintiffs to support their dismissal from the church. The *Brewer* court based its holding on the very common law considerations which we have rejected and was decided long before *New York Times, Inc. v. Sullivan, supra,* 376 U.S. 254.

come to be labeled "constitutional malice."

In the *Gertz* case, the plaintiff was a private individual who allegedly had been defamed by an article appearing in defendant's magazine. After acknowledging that it had ". . . struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment" (*Gertz, supra,* 418 U.S. at p. 325 [41 L.Ed.2d at p. 797]), the court held that (1) public persons may recover for defamation only upon clear and convincing proof of constitutional malice (*Id.* at pp. 342-343 [41 L.Ed.2d at pp. 806-807]); (2) all persons defamed by news media may recover presumed and punitive damages only if they establish liability by clear and convincing proof of constitutional malice (*Id.* at pp. 348-350 [41 L.Ed.2d at pp. 810-811]); states may not impose liability without fault but may define the level of fault required for recovery by private persons defamed by the news media (*Id.* at pp. 347-348 [41 L.Ed.2d at pp. 809-810]); and (4) the states' interest in protecting reputation extends no further than compensation for actual injury; therefore, a private person defamed by news media must show constitutional malice before presumed or punitive damages may be imposed. (*Id.* at pp. 349-350 [41 L.Ed.2d at pp. 810-811].)

In *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1984), *supra,* 472 U.S. 749, plaintiff sued a credit reporting agency which incorrectly reported plaintiff had filed for bankruptcy. The Supreme Court held that the rule of *Gertz* did not apply when the false and defamatory statements did not involve matters of public concern. (*Id.* at p. 759-760 [86 L.Ed.2d at pp. 602-603].) It concluded that plaintiff's credit report concerned no public issue. (*Id.* at p. 762 [86 L.Ed.2d at pp. 604-605].)

Taking its cue from *New York Times,* California requires proof by clear and convincing evidence of constitutional malice before a public official or one determined to be a public figure may recover damages for a defamatory falsehood related to his/her official conduct. (*McCoy v. Hearst Corp., supra,* 42 Cal.3d at 841.) In dicta, this court has held that when a private individual, as distinguished from a public figure, sues a media defendant for defamation, a negligence standard of proof applies. *(Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 433 [142 Cal.Rptr. 304], cert. denied (1978) 436 U.S. 918 [56 L.Ed.2d 759, 98 S.Ct. 2265], overruled on other grounds by *McCoy v. Hearst Corp., supra.)*

These rules were developed by the courts to protect the constitutional guarantees of free speech and free press. We hold that the right to free exercise of religion is a constitutional guarantee of equal significance. Throughout our history, our courts have reiterated the importance and special place the free exercise clause enjoys in our constitutional scheme. As noted by the United States Supreme Court in *United States v. Ballard* (1944) 322 U.S. 78, page 87 [88 L.Ed. 1148, at page 1154, 64 S.Ct. 882], "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." (See also *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 [49 L.Ed.2d 151, 96 S.Ct. 2372]; *Wisconsin v. Yoder*

(1972) 406 U.S. 205 [32 L.Ed.2d 15, 92 S.Ct. 1526]; *Sherbert v. Verner, supra* 374 U.S. 398; *Cantwell v. Connecticut, supra,* 310 U.S. 296; *Paul v. Watchtower Soc. of New York, supra,* 819 F.2d 875; *Church of Scientology of Cal. v. Siegelman* (S.D.N.Y. 1979) 475 F.Supp. 950; *Miller v. Catholic Diocese of Great Falls* (Mont. 1986) 728 P.2d 794.)

Our accommodation of the competing interests of our society—one protecting reputation, the other, the free exercise of religion—requires that we hold that in order for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, he/she must show, by clear and convincing evidence, that the defamation was made with constitutional malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. Whether a plaintiff is a "public figure" or the method of publication is via a "newspaper" is irrelevant under this holding.

(4a) Here, Meredith's allegedly defamatory remarks were made while explaining the Church's newly developed and misunderstood doctrine on divorce and remarriage, first at the pastoral conference in Tucson and then in the Pastor's Report. All parties agree there was confusion through the Church regarding the addition of the third ground for divorce (desertion by the unconverted mate) and the McNairs' divorce and his remarriage. Respondent contends that the defamation was gratuitous, totally outside the context of any legitimate discussion of a religious dispute. Nonetheless, we cannot ignore the crucial fact that Meredith's remarks

were made while he was explaining Church doctrine.[13] As noted above, the First Amendment mandates a jealous guarding of religious practice unless it endangers a paramount interest of the state. *(Sherbert v. Verner, supra,* 374 U.S. 398.) The holding we have articulated strikes an appropriate balance between our citizens' reputational interests and our society's interest in protecting the right to free exercise of religion.

(5) The record indicates that the jury was charged with instructions which do not require a finding of constitutional malice, as we have defined it. While appellants had requested such an instruction, the court instead accepted those offered by the respondent, over appellants' objection. BAJI No. 7.06 defined actual malice as follows: "Actual malice is a state of mind. It is actual hatred or ill will by the defendant against the plaintiff which induces publication. Malice may not be implied or inferred merely from the fact of publication or merely from negligence in publication. However, actual malice may be proved by either direct or circumstantial evidence." Special instruction No. 12 provided, "In deciding whether the statements published were true or false, you may not consider whether the defendants believed the statements were true. You must only consider whether or not the statements were

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[13]Our opinion is based on the unique facts of this case that involve a former well-known and important member of the church (respondent) in a controversy that raises questions concerning church doctrine and teachings. We are not saying that explanation of church doctrine per se can shield the speaker or writer from a negligence action for libel or slander. There certainly must be a nexus between the person allegedly slandered or libeled and the religious activity involved. Accordingly, any determination of the malice required must be decided on a case by case basis.

objectively false."[14] These instructions are framed in the language of negligence. We have concluded that the First Amendment requires *New York Times* constitutional malice instructions which require a finding that defendant's defamatory statements were made "with knowledge that it was false or with reckless disregard of whether it was false or not" *(New York Times Co., supra,* 376 U.S. 254), focusing not on whether the statement was objectively true or false, but on defendant's knowledge of whether the statement was true or false.

(4b) In First Amendment media cases, the role of the appellate court is to review the record independently to decide whether ". . . the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' [Citations.]" *(McCoy v. Hearst Corp., supra,* 42 Cal.3d at p.842, quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 510-511 [80 L.Ed.2d 502, 523, 104 S.Ct. 1949].) In this case, the record does not support a finding by us that respondent presented evidence which crossed this "constitutional threshold."

(6) Meredith and McNair also have raised a statute of limitations argument. They contend that respondent was not entitled to substitute them for Does I and II, pursuant to *Code of Civil Procedure* section 474, because

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[14]The authority cited for this instruction was *Emde v. San Joaquin County etc. Council* (1943) 23 Cal.2d 146 [143 P.2d 20, 150 A.L.R. 916].

she knew their identities.[15]

The pertinent facts are as follows: Meredith's speech to the Ministers' Conference was made in January 1979; the article in the Pastor's Report was published on June 25, 1979. Respondent filed her original complaint for libel on July 13, 1979, against the Church and Does 1-50. Attached to this complaint was a copy of the allegedly libelous Pastor's Report article which designated Meredith as the author. On October 4, 1979, respondent filed her amended complaint, adding the slander cause of action and alleging she had heard the tape of Meredith's Ministers' Conference remarks in August or September 1979. This complaint contained a verbatim quote of the remarks but did not name Meredith or McNair as defendants. On June 16, 1980, pursuant to *Code of Civil Procedure* section 474, respondent substituted Meredith and McNair for Does 1 and 2. On September 26, 1980, respondent filed her second Amended Complaint, naming Meredith and McNair and also Does I through XXX.

Meredith's and McNair's argument that respondent was not entitled to substitute under section 474 because she knew their identities fails because it is based on a literal and very narrow reading of the statutory language. Section 474 is to be construed liberally to enable a plaintiff to commence an action before it has become barred by the statute of limitations. *(Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 355 [220

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[15] *Code of Civil Procedure* section 474, in pertinent part, provides: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading . . . may be amended accordingly; . . ."

Cal.Rptr. 602].) "[A] plaintiff is deemed 'ignorant of the name of a defendant' if he knew the identity of the person but was ignorant of facts giving him a cause of action against the person." (*Barnes v. Wilson* (1974) 40 Cal.App.3d 199, 205 [114 Cal.Rptr. 839].) Here, respondent's slander cause of action did not accrue until she heard the allegedly defamatory remarks and became distressed (*Manguso v. Oceanside Unified School Dist.* (1979) 88 Cal.App.3d 725, 731 [152 Cal.Rptr. 27]), and both McNair and Meredith acknowledge this was not until August or September 1979, when she received a tape of Meredith's remarks. Respondent learned of the allegedly libelous article in the Pastor's Report in late June or early July 1979. Respondent's amendment designating Meredith and McNair as Does 1 and 2 was filed June 16, 1980, within the one-year statutes of limitation applicable to both causes of action. (Code Civ. Proc. § 340, subd. (3).)

Having reached these holdings, we need not address the various other issues raised by appellants.

The judgment is reversed and the cause remanded for a new trial consistent with the requirements of this opinion. Each to bear own costs.

Feinerman, P.J., and Ashby, J., concurred.

On January 27, 1988, the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied March 17, 1988. Mosk, J., and Broussard, J., were of the opinion that the petition should be granted.

Second Appellate District,
Division Five,
No. B039651 S020833

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LEONA MCNAIR, Appellant

v.

WORLDWIDE CHURCH OF GOD Et Al., Respondents

Respondents' petition for review DENIED.

Arabian

Acting Chief Justice

APPENDIX C

file copy

FILED

NOV 21 1988

FRANK S. ZOLIN, COUNTY CLERK
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

LEONA McNAIR, Plaintiff, vs. WORLDWIDE CHURCH OF GOD, et al., Defendants.	Case No. NEC 27381 JUDGMENT BY COURT [C.C.P. § 437c]

The motions of defendants Worldwide Church of God, Roderick Meredith, Raymond McNair, and Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, for an Order granting summary judgment came on regularly for hearing by the Court, the Honorable Richard A. Lavine, presiding, on October 21, 1988. Plaintiff appeared through her counsel, Antony Stuart of Greene, O'Reilly, Broillet, Paul, Simon & Wheeler; defendants Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, Roderick Meredith, and Raymond McNair appeared through their counsel, Allan Browne of Browne & Woods; defendant Worldwide

Church of God appeared through its co-counsel, Ralph K. Helge and Jeff Lowery of Ralph K. Helge & Associates, and Roy Weatherup of Haight, Brown & Bonesteel.

The Court has considered all the admissible evidence set forth in the papers submitted and in the record, and the inferences properly deducible therefrom. The Court determines that there is no showing of constitutional malice as required by the appellate court in *McNair v. Worldwide Church of God,* 197 Cal.App.3d 363 (1987), that there is no triable issue as to any material fact and that the defendants, and each of them, are entitled to judgment as a matter of law as provided in the Court's Ruling on Motion for Summary Judgment dated October 21, 1988.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the motion for summary judgment of defendants Raymond McNair, Roderick Meredith, Worldwide Church of God and Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, and each of them, be, and hereby is, granted, and that judgment be entered accordingly for defendants, and each of them, and against plaintiff Leona McNair.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Leroy Neff, as Executor of the Estate of Herbert W. Armstrong shall recover from plaintiff his costs in the above-captioned action in the amount of $ _____.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Worldwide Church of God shall recover from plaintiff its costs in the above-captioned action in the amount of $ _____.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendants Raymond McNair and Roderick Meredith shall recover from plaintiff their costs in the above-captioned action in the amount of $_____.

Dated: NOV 21 1988, 1988

Richard A. Lavine
Judge of the Superior Court

Presented By:

BROWNE & WOODS

By _____
Allan Browne
Attorneys for Defendants,
Leroy Neff, as Executor of the
Estate of Herbert W. Armstrong,
Raymond McNair, and Roderick C. Meredith

HAIGHT, BROWN & BONESTEEL

By _____
Roy Weatherup
Attorneys for Defendant
Worldwide Church of God

RALPH K. HELGE & ASSOCIATES

By _____
Ralph K. Helge
Attorneys for Defendant
Worldwide Church of God

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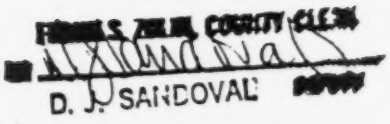

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

LEONA MCNAIR, Plaintiff, vs. WORLDWIDE CHURCH OF GOD, etc., et al., Defendants.	Case No. NEC 273 81 RULING ON MOTION FOR SUMMARY JUDGMENT

I. IS COURT PERMITTED TO HEAR MOTION FOR SUMMARY JUDGMENT?

A. The court ordered on p. 380: "The judgment is reversed and the cause remanded for a new trial consistent with the requirements of this opinion. . . ."

B. I interpret the direction for a new trial to be that the new trial shall be on all the issues set forth in the amended pleadings and not merely on the issue of constitutional malice. When a trial court is remanded the case with a direction for conduct of a new trial, the court can do all things consistent with a new trial. This includes hearing a motion for judgment on the pleadings and the allowing of plaintiff to amend the pleadings. Had there not been

amendment of the pleadings for the benefit of plaintiff, defendants could have made such a motion at time of trial, and the trial judge might have granted the motion on the basis of pleadings, so these pretrial proceedings are for the benefit of plaintiff as well as defendants. A motion for summary judgment is certainly consistent with the power of a trial court to conduct a new trial. In First Amendment cases involving religious freedom as well as freedom of the press, motions for summary judgment are favored so as, in proper cases, the avoidance of a trial is done to prevent a chilling effect on religion or the press.

C. Hence this motion for summary judgment is properly before me. I know from having served twice by designation on the Fifth Division of the Second Appellate District, that such division strives to give adequate instruction to the trial judge when matters are remanded so that there is little or no doubt in the mind of the trial judge as to what to do. Hence had the Fifth Division desire (*sic*) that the trial judge simply conduct a trial and not engage in any pretrial proceedings, the Fifth Division would have so stated. In absence of such prohibition, I am taking action on the motion for summary judgment.

II. DEFENDANTS URGE THAT THE FACTS RECITED BY THE APPELLATE COURT AND ITS RULING THEREON CONSTITUTES LAW OF THE CASE; PLAINTIFF ARGUES THE OPPOSITE.

A. The appellate court stated at p. 378: "In this case the record does not support a finding by us that respondent presented evidence which crossed this

'constitutional threshold.' " I consider that to mean that the appellate court ruled that the evidence presented at the first trial by plaintiff (including not only that urged on appeal but by a review of the entire record) was insufficient to meet the constitutional threshold that a plaintiff must cross in a case involving freedom of religion.

B. My reading of this, in conjunction with the direction for a new trial, is that plaintiff now has the opportunity of presenting any additional evidence that may enable her to cross this constitutional threshold. Such direction for a new trial was fair to plaintiff, for until the appellate court spoke on the subject of whether this type of case demands the same type of constitutional malice as is required in a case of freedom of press and a public figure, plaintiff may not have realized in advance that she must present evidence sufficient to cross this constitutional threshold. She is now permitted in this motion for summary judgment (and later at the trial, should this motion for summary judgment fail) to marshal her evidence to show that she can cross the constitutional threshold.

C. Hence I hold that the law of the case is that as far as the evidence produced at the trial is concerned, the law of the case is that such evidence was insufficient to constitute constitutional malice. Hence I must examine plaintiff's declarations or affidavits to see if she is able to respond to the challenge posed by this motion for summary judgment. If there is competent new evidence, then the law of the case does not apply to such new competent evidence. If she is unable to present competent new evidence, then the law of the case applies, and I am bound by the holding of the appellate court.

III. DEFENDANTS' OBJECTIONS TO PLAINTIFF'S SEVERAL DECLARATION FILED IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

A. Declaration of Leona McNair, September 6, 1988 (Ex. A to Opposition)

p. 1, l. 13-15, l. 20-25: hearsay, no foundation, conclusion and opinion, sustained; l. 25 OK, overruled.

p. 1, l. 13-15: conclusionary but background, overruled.

p. 2, l. 1-15: hearsay, no foundation, opinion, irrelevant, argumentative, sustained.

p. 2, l. 17-20: no personal knowledge, hearsay, opinion, no foundation, sustained.

p. 2, l. 25-27: no personal knowledge, hearsay, no foundation, opinion, conclusion, sustained.

p. 2, l. 28 to p. 3, l. 9: not hearsay but personal knowledge, overruled.

p. 3, l. 11 to p. 4, l. 2: not personal knowledge, hearsay, no foundation, opinion, sustained.

B. Declaration of Leona McNair, May 16, 1983 (Ex. B)

p. 9, l. 9-10: conclusionary but background, overruled.

p. 9, l. 11 to p. 10, l. 2: hearsay, conclusionary, no foundation, sustained, except p. 9, l. 13-14 which is OK and overruled.

p. 10, l. 3 to p. 11, l. 4: hearsay, no foundation, conclusionary, not personal knowledge, sustained, except p. 10, l. 9-12 and l. 15-17, l. 18-22, and l. 24-28, and p. 11, l. 4, overruled.

p. 11, l. 5-17: l. 5-9 OK and overruled; l. 9-12 conclusionary, argumentative, not personal knowledge, sustained; l. 13-15 OK and overruled; l. 15-17, conclusion, sustained.

p. 11, l. 18-24: conclusion, not best evidence, irrelevant to summary judgment, sustained.

C. Declaration of Leona McNair, September 3, 1982 (Ex. B)

p. 12, l. 7-17: personal knowledge, overruled.

p. 12, l. 18-24: conclusion, opinion, hearsay, no foundation, sustained.

p. 12, l. 25 to p. 13, l. 12: p. 12, l. 25-26 OK overruled; "a doctrine professed by Herbert Armstrong" is hearsay and opinion without foundation, sustained; l. 28, p. 12 to p. 13, l. 6 OK, overruled; "I believe this practice painful. . ." is opinion without foundation, is opinion and sustained; l. 11-12 OK, overruled.

p. 13, l. 13-27: "Many sacrifices. . ." is opinion without foundation, sustained; l. 13-15 is opinion, hearsay without foundation, sustained.

p. 13, l. 16-27 is on personal knowledge, overruled.

p. 14, l. 1-4: background and personal knowledge, overruled.

p. 14, l. 13-21: on personal knowledge, overruled.

p. 14, l. 22 to p. 15, l. 15: p. 14, l. 22-28 is on personal knowledge and overruled; l. 28 to p. 15, l. 2 is opinion, no foundation, sustained.

p. 15, l. 3 to l. 5 is personal knowledge and overruled; l. 5-11 is not of personal knowledge, argumentative, sustained; l. 11-14 is argumentative, opinion, no foundation, sustained; l. 14-15 is on personal knowledge

and overruled.

p. 15, l. 16 to p. 16, l. 4: opinion, no foundation, hearsay, argumentative, sustained.

D. Declaration of Leona McNair, June 10, 1983 (Ex. B)

p. 1, l. 24 to p. 2, l. 13: no foundation, conclusion, hearsay, argumentative, sustained.

p. 2, l. 14-17: personal knowledge and overruled.

p. 2, l. 18-25: opinion, no foundation, conclusion, sustained.

p. 2, l. 26 to p. 3, l. 7: irrelevant, no foundation, hearsay, sustained.

E. Declaration of Ruth McNair, September 2, 1982 (Ex. C)

p. 1, l. 11-18: hearsay, no foundation, opinion, sustained.

p. 1, l. 20 to p. 2, l. 7: hearsay, no foundation, opinion, sustained, except l. 23-28: ". . . professed beliefs," overruled.

p. 2, l. 7-18: opinion, no foundation, conclusion, argumentative, sustained, except l. 9-10, and l. 13-16 is personal knowledge, overruled.

p. 2, l. 22-28: opinion, no foundation, conclusion, argumentative, sustained.

p. 3, l. 1-18: conclusion, no foundation, hearsay, argumentative, sustained.

p. 3, l. 10-18: opinion, no foundation , lack of personal knowledge, sustained, except l. 15: "I did not hear her swear at Dad" is personal knowledge and overruled.

p. 3, l. 20 to p. 4, l. 11: opinion, no foundation, hearsay, argumentative, sustained, except p. 4, l. 3-8 ending with work "kitchen" is personal knowledge and overruled.

p. 4, l. 24 to p. 5, l. 2: not personal knowledge, conclusion, sustained.

p. 5, l. 13-20: opinion, no foundation, conclusion, argumentative, sustained.

p. 5, l. 22 to p. 6, l. 5: opinion, no foundation, conclusion, argumentative, sustained.

IV. DEFENDANTS' SEPARATE STATEMENT OF NONCONTROVERTED FACTS.

1. Re reporting to Dr. Meredith that they personally witnessed same, by Raymond McNair, Joseph McNair, Bruce McNair, Michael Meredith and James Meredith. Plaintiff only traverses declaration of the Meredith sons on basis that they did not return from England until June, which was after the filing of the divorce but before the dissolution was adjudicated. To that extent there is a factual issue, however plaintiff still lived in the house and allegedly performed the acts described in all declarations. Since plaintiff fails to traverse the declarations of the McNair sons, there is ample evidence to support this statement, which is its essential elements is uncontroverted, and is granted.

2. Re Dr. Meredith relied on reports. Plaintiff states that witnesses could not report on that which did not occur. But this does not go to the proposition that Dr. Meredith relied on these reports of five persons, including the three sons of McNair, and his own two sons. All were percipient witnesses, although plaintiff contends that this is not true of the Meredith sons for

the period before June. But Dr. Meredith stated that he relied upon the totality, and plaintiff fails to traverse the totality. Plaintiff objects that we have only Dr. Meredith's word on his own state of mind and hence under CCP § 437c(e) the court has the discretion not to accept this in summary judgment motions. Although the constitutional test is a subjective one, there are objective considerations as well. All five persons were percipient witnesses and lived wholly or in part in the household where the alleged events occurred. What better evidence is available to Dr. Meredith, other than the contrary statements of plaintiff, who is also an interested party? In California we no longer have "fault" divorces, but have "no fault" dissolutions, hence the truth or falsity of the allegations were not at issue in the dissolution trial. Hence Dr. Meredith is permitted to rely upon the statements of persons who appear to know the facts.

Anderson v. Liberty Lobbey (*sic*) places upon this court the directed verdict standard, and that the trial court must look at the quantum of clear and convincing evidence in summary judgments in this type of case. At p. 2513: "For example, there is no genuine issue of the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." And at p. 2514, in regard to the "state of mind" objection in summary judgments, the Supreme Court held ". . . but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." Plaintiff supplies us with no evidence that Dr. Meredith did not subjectively rely upon the five witnesses who informed him of the events in the McNair household. There is no evidence presented by plaintiff that any of the five persons were impeached

by untruths, or had committed felonies involving moral turpitude, or were otherwise unreliable. Plaintiff argues that because all five persons are members of the Worldwide Church they are under a discipline that whatever someone of the rank of Dr. Meredith says, they must accept as church doctrine. Whether that is true or not is not shown by plaintiff's declarations, as plaintiff is not an expert witness, nor has she shown sufficient foundation to qualify her. Therefore her alleged opinions are not admissible evidence. The two dissents in *Anderson* focus on the problems that may befall a trial court in seeking to apply the quantum of evidence test enjoined by the majority opinion. In the case at bar the court does not have the problems described in the two *Anderson* dissents, as the five statements are virtually uncontradicted as to being reliable sources. In *Liberty Lobbey v. Dow Jones,* 14 Med.L.Rep. 2249, the trial court, as held by the U.S. Court of Appeals, likewise found absence of evidence to indicate that the reporter and editors had reason to doubt the sources.

Planned Protective Services v. George Gorton, 200 CA 3d 1, also compels a plaintiff to produce clear and convincing evidence in opposing a motion for summary judgment of this type. Hence the ruling California law echos (*sic*) the governing federal law. Also *Readers Digest v. Superior Court,* 37 Cal.3d 244, holds there is no constitutional malice where defendant relies on sources considered by him to be of unsullied reputation for veracity. Under *Lerner v. Superior Court,* CA 3d 656, (*sic*) the court holds that a single declaration by a source other than defendant is sufficient to comply with CCP § 437c(e). Here we have five declarations which support the declaration of Dr. Meredith as to

what he relied upon. Therefore the court need not rely only upon *ipse dixit* declaration of Dr. Meredith, but has outside corroboration. Hence No. 2 granted.

3. Re Raymond, Joseph and Bruce McNair, and Michael and James Meredith being sources of unquestioned reputation for veracity. Again, plaintiff does not really traverse this with competent evidence to make this a jury question. As to CCP § 437c(e) objection, I am bound by decision in *Anderson v. Liberty Lobbey* (*sic*) to the contrary. It is up to plaintiff to present sufficient evidence to make this a jury question. Plaintiff has failed to do so. Hence granted.

4. Re ecclesiastical determinations. Plaintiff objects that this presents an area in which the court should not enter, namely determining what is or is not a tenet of the Worldwide Church of God. I agree that a court should be loath to enter these areas unless it becomes necessary in determining that which it is the function of a court to determine. An example of the latter is that Evidence Code § 1032 places upon the court the obligation of determining, when a priest-penitent privilege is asserted, whether the priest is a member of a denomination that relies on the sanctity of a confession. In *People v. Edwards,* 203 CA 3d 1358, the trial court heard conflicting evidence as to the scope of a confession in the Episcopalian Church, and made its determination as to which expert was the more creditable. My role is easier in the motion at bar, since I do not have to decide on conflicting evidence, but only upon uncontradicted evidence. Also see *Molko v. Holy Spirit Assn.*, ___ C3d ___ (Oct 17, 1988) *Metro News Slip Opinion Supp.*, 2, 13 Hence granted as to this fact.

5. Re Dr. Meredith believes as matter of faith that Church's determination in this case was divinely inspired.

Although this is a state-of-mind question, as to which plaintiff objects on basis of CCP § 437c(e) as to state of mind of declarant, I am bound by holding *Anderson v. Liberty Lobbey, supra.* Hence granted as to this fact.

6. Re Dr. Meredith believed his oral and written statements were a fair summary of the Church's ecclesiastical determinations. Here again, we are bound by *Anderson v. Liberty Lobby.* In *Planned Protective Services v. Gorton,* 200 CA 3d 1, the court used the same test as in *Readers Digest, supra,* that actual malice can be proven by circumstantial evidence such as failure to investigate, anger and hostility toward plaintiff, or reliance on sources known to be unreliable or biased against plaintiff. The circumstantial evidence here shows no failure to investigate, or anger or hostility against plaintiff, on the part of Dr. Meredith, or reliance on sources known to be unreliable or biased against plaintiff. The five statements independent of Dr. Meredith back up his state of mind. Hence No. 6 is granted.

V. STATUS OF HERBERT ARMSTRONG AND ESTATE OF HERBERT ARMSTRONG.

A. Plaintiff urges that since the first appellate decision overturned the summary judgment in favor of Estate of Herbert Armstrong that I cannot again grant a summary judgment in favor of the Estate of Herbert Armstrong. But the first appellate decision reversed the summary judgment in favor of the Estate of Herbert Armstrong on the basis that as the employer of the other person whether engaged in a conspiracy or not, such liability of the employer was derivative, not unlike liability under the doctrine of *respondeat superior.* Hence if McNair and Dr. Meredith are entitled to summary

judgment, the Estate of Herbert Armstrong *a fortiori* may reap the benefits.

B. Hence if there are no triable facts on the issue of constitutional malice in favor of plaintiff, the Estate of Herbert Armstrong is entitled to a summary judgment.

VI. DEFENDANTS ARE ALL ENTITLED TO SUMMARY JUDGMENT.

A. As shown in IV, *supra*, there are no triable issues of fact on the issue of constitutional malice, as to which plaintiff has failed to show facts that should go to the jury, whether by way of evidence formerly produced or by new evidence as shown in her several declarations.

B. Hence all defendants are entitled to a summary judgment.

VII. COUNSEL FOR DEFENDANTS TO PREPARE, SERVE AND LODGE A PROPOSED JUDGMENT CONSISTENT WITH AND INCORPORATING THE ESSENTIAL ELEMENTS OF THE ABOVE.

Dated: Oct. 21, 1985

Richard A. Lavine
Judge of the Superior Court

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

LEONA McNAIR,	) B039651
Plaintiff and Appellant,	) (Super. Ct. No.
v.	) NEC27381)
WORLDWIDE CHURCH	) ORDER
OF GOD, et al.,	)
Defendants and	)
Respondents.	)
	)

The court has carefully reviewed the petitions for rehearing and they are denied. One argument raised by counsel for defendant Worldwide Church of God warrants brief comment. In the church's rehearing petition, it is contended that the question of whether the sufficiency of the evidence to demonstrate constitutional malice was raised as an issue in *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 372-380.[1] The church argues in its rehearing petition as

[1]By constitutional malice, we refer to the state of mind that must exist in order to impose civil liability for defamatory statements made concerning a public figure as that term was defined in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280, and as that term was applied to plaintiff in the present case in *McNair v. Worldwide Church of God, supra,* 197 Cal.App.3d at pages 375-380.

follows: "The sufficiency of the evidence to show constitutional malice *was expressly raised* as an issue by the appellants in *McNair I. McNair I's* comment on the evidence was a proper response to the then-appellants' arguments." (Original italics.) We respectfully disagree with the church's contention. The church cites certain language at page 65 of its opening brief in *McNair I.* However, the language at page 65 of the brief was the final sentence in an argument which stated at page 61, "Regardless of whether the traditional common law definition was properly invoked so as to defeat the privilege established by *Civil Code* section 47(3) and justify compensatory damages, the federal Constitution does not permit the award of punitive damages, even in favor of a public figure, in the absence of constitutional malice." This court has carefully reviewed the arguments appearing at pages 61-65 of the opening brief in *McNair I.* The argument that was raised was not whether there was clear and convincing evidence of constitutional malice which barred any recovery by plaintiff. Rather, the contention related to whether the federal Constitution allowed an award of punitive damages in the absence of constitutional malice. In taking the last sentence of this argument out of its context, the church has inaccurately stated the contention that it raised in *McNair I.*

In any event, even if the issue was raised, as noted in the opinion in this case, our prior decision did not purport to find, as a matter of law, that clear and convincing evidence of constitutional malice was not present in the evidentiary record of the first trial. As noted in our opinion filed on March 27, 1991, the court in *McNair I* ordered that a new trial occur, something that could not have transpired had it determined that

insufficient evidence of constitutional malice had been presented at the initial trial. Finally, it is clear that the first trial was not tried on a theory of constitutional malice; rather, the initial trial was conducted on the theory that mere negligent conduct in making defamatory statements concerning plaintiff gave rise to liability. There has never been a trial where the issue was one of the existence of constitutional malice. Our opinion directs that such a trial take place.

TURNER, P.J.

GRIGNON, J.

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States of America provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States of America provides that:

> "**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such

State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

PORTIONS OF RESPONDENT'S BRIEF, PETITION FOR REHEARING, AND PETITIONS FOR REVIEW SHOWING THAT THE FEDERAL FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED

The federal question in issue in this petition for writ of certiorari was timely and properly raised in the respondent's brief filed by the Worldwide Church of God, on April 19, 1990, in relevant part as follows:

> **"Unless a Plaintiff Can Produce Clear and Convincing Evidence of Constitutional Malice, Not Just Speculative Inferences, the Defendant in a Defamation Case to Which the Rule Applies Is Entitled to Summary Judgment as a Matter of Law.**

In addition to refusing to acknowledge the applicability of the constitutional malice rule to her case, plaintiff Leona McNair ignores or rejects the body of law that specifies the manner in which the rule is applied in practice. Nonetheless, it is clear from the case law that the procedural rules that have been developed in the area rise to the level of constitutional mandate.

In *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Supreme Court reiterated the settled rule, established by the *New York Times* case and its progeny, that the burden of proving constitutional malice "requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." 466 U.S. at 511 (footnote 30). Moreover, the issue of "whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact," but judges in both trial and appellate

courts, "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" 466 U.S. at 511. The requirement of independent judicial review of the evidence is "a rule of federal constitutional law." 466 U.S. at 510.

The reason for the rules set forth in *Bose Corporation* and other cases is obvious. If the role of juries in deciding constitutional malice were not strictly regulated, the rule of *New York Times* would be relegated to the position of an abstract principle of law. There would be no limitation to the power of the trier of fact to speculate concerning the defendant's state of mind.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the plaintiffs argued that "the defendant [in a defamation case] should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." 477 U.S. at 256. This argument was rejected by the Supreme Court, which held that, in such a situation, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." 477 U.S. at 257. The test is whether, in opposing a motion for summary judgment, the plaintiff has offered clear and convincing evidence on the basis of which a reasonable jury might find constitutional malice. 477 U.S. at 255-257.

California courts have scrupulously followed the constitutional commands of the Supreme Court of the United States in applying the principles of *New York Times*. In *Reader's Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984), the state high court recognized that the rule of constitutional malice "establishes a

subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." The court's attention must be directed to his attitude of truth or falsity of what was said or written, not his state of mind toward the plaintiff. 37 Cal.3d at 257. The *Reader's Digest* court directed entry of summary judgment in favor of the petitioner, finding no evidence that those individuals responsible for a supposedly defamatory publication knew that what was said was false "or even entertained serious doubts." 37 Cal.3d at 258. Moreover, the high court recognized that, if the plaintiffs had no cause of action for defamation because of the constitutional malice rule, they could not sue for ancillary causes of action, such as invasion of privacy and intentional infliction emotional distress. This is because "liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication." 37 Cal.3d at 265.

The *Reader's Digest* case demonstrates the proper approach on a motion for summary judgment where the issue is the existence of constitutional malice. The court will examine all of the evidence bearing on the actual state of mind of the author or authors of the allegedly defamatory material. If there is no clear and convincing evidence showing that the defendants disbelieved what they said or wrote, or entertained serious doubts, in fact, concerning the truthfulness of their publication, then summary judgment is constitutionally required.

Another illustrative case is *McCoy v. Hearst Corporation,* 42 Cal.3d 835 (1986). In *McCoy,* a unanimous Supreme Court, reweighing the evidence on constitutional malice, found the plaintiffs' case wanting for lack of clear and convincing evidence of such malice.

The Supreme Court noted that, in its de novo examination of the evidence on the issue, the court "may not restrict itself . . . to evidence favorable to the judgment [of the trial court, in favor of the plaintiff]." 42 Cal.3d at 845. "Normal principles of substantial evidence reviewed do not apply to the appellate court's independent review" of the issue of constitutional malice in a defamation case. 42 Cal.3d at 846. In fact, the appellate court, in its independent examination of the evidence, may properly "substitute its own inferences on the issue of actual malice for those drawn by the trier of fact." 42 Cal.3d at 846.

After an exhaustive analysis of the evidence in the record, the *McCoy* court found that the defendants actually did believe what was published, even though there was contrary evidence available to them as well as evidence supporting what was written. In such a situation, there was no constitutional malice, as a matter of law. 42 Cal.3d at 870-871.

The *McCoy* case is also significant because it deals with an issue that Leona McNair has raised in the present appeal. As occurred at the 1984 jury trial that led to this court's decision in *McNair I,* there were jury instructions in *McCoy* defining "malice" in ambiguous and inconsistent ways. Thus, "the jury may well have been confused." 42 Cal.3d at 872. In any event, since the Supreme Court's independent review of the evidence demonstrated the absence of constitutional malice within the meaning of the *New York Times* case, the confusing and contradictory instructions of "malice" could be disregarded. 42 Cal.3d at 873. Similarly, in *Fletcher v. San Jose Mercury News,* 216 Cal.App.3d 172 (1989), it was the trial judge who set aside a jury's finding of constitutional malice, and his ruling was upheld on

appeal.

Although sometimes described as a "drastic" remedy, "summary judgment is a favored procedure for resolving First Amendment cases to avoid needless litigation which would interfere with the exercise of free speech necessary for the continued existence of a free society." *Morales v. Coastside Scavenger Company,* 167 Cal.App.3d 731, 736 (1985). A plaintiff should not be allowed to force a defendant into trial, unless he or she actually has clear and convincing evidence of constitutional malice."

The federal question was timely and properly raised in the petition for rehearing filed, on April 24, 1991, by the Worldwide Church of God, in pertinent part as follows:

> " **The Court of Appeal Has Trampled on the Constitutional Rights of the Defendants, as Those Rights Have Been Delineated by the Highest Courts of the Nation and the State, by Holding That a Finding of Constitutional Malice May Be Based Upon a Chain of Speculative Inferences Emanating From the Supposed Truthfulness of the Plaintiff.**

Although *McNair II* reaffirms the rule of law announced in *McNair I,* that the plaintiff in a defamation case arising from religious speech must prove constitutional malice, it fails to interpret and apply the rule correctly. The constitutional shield of the constitutional malice rule has become so weak, if *McNair II* is right, that the rule itself is nothing more than an abstract principle of law to be followed or rejected in the discretion of the trier of fact. The constitutional malice principle, so carefully refined over the years, should not become a paper tiger. Plaintiff should not be allowed to trample on the constitutional rights of freedom of

speech and freedom of religion.

When *McNair I* extended the protection of the constitutional malice rule to religious speech, it also imported the large body of law delineating the constitutional malice principle, a body of law that emanates from *New York Times Company v. Sullivan,* 376 U.S. 254 (1964). Nonetheless, *McNair II* has refused to apply this body of constitutional law properly to the facts before it, even assuming that the *McNair II* court was not bound by the holding of *McNair I* on the sufficiency of the evidence.

Constitutional malice involves a person's actual state of mind with respect to the truth or falsity of what he has said or written. It is the person's actual state of mind, rather than any constructive state of mind, that must be examined. *Garrison v. State of Louisiana,* 379 U.S. 64 (1964). To be constitutionally malicious, a defendant must in fact entertain serious doubts as to the truth of his publication. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). Generally, a finding of constitutional malice may not be based upon inadequate investigation of the facts. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967).

California decisions are in accord with those of the Supreme Court of the United States. Regardless of the defendant's attitude toward the plaintiff, the sole issue as to constitutional malice is his state of mind with respect to the truth or falsity of what was said or written. *Heritage Publishing Company v. Cummins,* 124 Cal.App.3d 305 (1981); *Reader's Digest Association v. Superior Court,* 37 Cal.3d 244 (1984); *McCoy v. Hearst Corporation,* 42 Cal.3d 835 (1986).

The *McNair II* court has held that a trier of fact could believe that the plaintiff was truthful in denying what

was said about her; that witnesses with contrary testimony must therefore be deemed untruthful; that a witness who is untruthful in part of his testimony may be disbelieved in all of his testimony; and that the defendants were therefore guilty of constitutional malice. *(McNair II,* pages 28-32.) This line of reasoning is not only preposterous, making a mockery of the constitutional malice principle, but has been specifically rejected by the Supreme Court of the United States. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-257 (1986). See also *McCoy v. Hearst Corporation,* 42 Cal.3d 835, 845-846 (1986) *(McCoy I).*

The *McNair II* court attempts to distinguish the Supreme Court decision in *McCoy I* on the ground that the defendants in *McCoy I* had no "motive" with respect to the plaintiffs, but were simply disinterested journalists. This purported distinction illustrates that the *McNair II* court confused the defendants' state of mind with respect to the plaintiff with their state of mind concerning what was said and written. Constitutional malice concerns only the latter. *Reader's Digest Association v. Superior Court,* 37 Cal.3d 244, 257 (1984); *Fletcher v. San Jose Mercury News,* 216 Cal.App.3d 172, 185-186 (1989); *Widener v. Pacific Gas and Electric Company,* 75 Cal.App.3d 415, 434 (1977). Furthermore, *McNair II* represents a misunderstanding of the concept of "motive."

A "motive" is a "cause or reason that moves the will and induces action." *Black's Law Dictionary,* 6th Edition, page 1014. "Motive is an idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion." *People v. Gibson,* 56 Cal.App.3d 119, 129 (1976).

One does not have a "motive" to believe or disbelieve

something. Rather, belief is the result of faith, reason, and evidence. The legal concept of "motive" relates to action, not to belief. Thus, the refusal of the *McNair II* court to follow *McCoy I* was clearly erroneous.

The cornerstone of *McNair II* is the proposition that, through a chain of inferences, constitutional malice may be inferred from a possible finding of lack of credibility on the part of defendant Roderick C. Meredith. This reasoning is constitutionally impermissible. "[A] determination of actual malice [constitutional malice] cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial." *Newton v. National Broadcasting Company,* ___F.2d. ___ (9th Cir. 1991), amended opinion filed April 5, 1991, reported in the *Los Angeles Daily Journal, Daily Appellate Report,* on April 8, 1991, pages 3945, 3948.

McNair II makes the serious mistake of lumping together all of the sources that defendant Roderick C. Meredith relied upon, failing to distinguish those statements based on personal observation from statements based on or confirmed by independent sources. However, when the actual declaration of Dr. Meredith is examined, it appears quite clearly that certain statements were based on personal observations, which statements were never directly contradicted even by Leona McNair. Other statements were based on sources, comments made by close relatives, which Dr. Meredith had no reason to disbelieve.

If the declarations in support of and in opposition to the defendants' motion for summary judgment are read together, as a whole, in the manner required by the *McCoy I* decision, it is obvious that the purported conflicts in the evidence are insignificant. There is certainly nothing that constitutes clear and convincing

evidence of constitutional malice on the part of defendant Meredith.

The key source of apparent discrepancies in the evidence concerns the timing of the McNair divorce. The plaintiff simply assumes that the time of a divorce is the time that one of the parties to a marriage files a petition in a civil court seeking dissolution of that person's marriage. Other people might think that the time of a divorce is the date of an interlocutory or final decree. However, from the record as a whole, it is obvious that defendant Meredith was concerned with the validity of the ecclesiastical divorce, and the time of the McNair divorce may have been the time that the Worldwide Church of God found the civil divorce to be valid in the eyes of the church.

The issue Dr. Meredith addressed was the controversy over the church's doctrinal issue of divorce and remarriage. Leona admitted that this was the issue that was addressed. It was not the doctrinal issue of "filing a petition for dissolution." Hence it is obvious that the relevant time period in Dr. Meredith's mind was not the date the petition for divorce was filed, but rather the date of Mr. Raymond McNair's divorce becoming final, at the very earliest. Hence all the facts occurring during the McNair marriage to that date were relevant, in Dr. Meredith's mind, to the issue he had to address.

Even Leona McNair acknowledges that there was a factual basis for the comments made about her if reference is made to the time frame between the filing of the divorce petition and the time that there was ecclesiastical recognition of the propriety of the divorce. Thus, the effort to find constitutional malice in the mind of defendant Meredith must fail, when one examines the record as a whole, and realizes that Dr. Meredith

meant one point in time when he referred to the timing of the McNair divorce, while Leona McNair conceived the time of her divorce to be a different, and earlier, point in time.

When the record of the present appeal is viewed properly, as a whole, as required by *McCoy I* and other constitutional malice cases, it is quite clear that plaintiff Leona McNair has no right to recover. "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." *McCoy v. Hearst Corporation,* 227 Cal.App.3d 1657, 1661 (1991) (*McCoy II).* The *McNair I* court generously allowed the plaintiff the opportunity to present any newly discovered evidence of constitutional malice, or any evidence that she already had but had not produced, since she had not been required to come forward with it. No new evidence has been offered. The requirement of proof of constitutional malice by clear and convincing evidence has not been satisfied. *McNair II* should have adhered to *McNair I,* just as *McCoy II* adhered to *McCoy I.*

If *McNair II* has been correctly decided, the constitutional malice rule has been emasculated. Every plaintiff in a defamation case claims that what was said or written about the plaintiff was untrue. If the trier of fact finds the statement untrue, he or she can thereby infer constitutional malice, according to *McNair II,* removing any constitutional restrictions that protect religious and political expression.

A fair examination of the record, faithful to the constitutional principles developed by the Supreme

Court of the United States and by other appellate courts, shows that the defendants are entitled to judgment. There is no evidence of constitutional malice, certainly no clear and convincing evidence, as the court held in *McNair I.* The Court of Appeal, in *McNair II,* should not have departed from *McNair I."*

The federal question in issue in this petition for writ of certiorari was timely and properly raised in the petition for review filed by the Worldwide Church of God, on May 6, 1991, before the Supreme Court of the State of California, in pertinent part as follows:

> **"A Finding of Constitutional Malice May Not Properly Be Based Upon a Chain of Speculative Inferences Emanating From the Supposed Truthfulness of the Plaintiff, or From the Alleged Lack of Credibility of a Defendant."**

Although *McNair II* reaffirms the rule of law announced in *McNair I,* that the plaintiff in a defamation case arising from religious speech must prove constitutional malice, it fails to interpret and apply the rule correctly. The constitutional shield of the constitutional malice rule has become so weak, if *McNair II* is right, that the rule itself is nothing more than an abstract principle of law to be followed or rejected in the discretion of the trier of fact. The constitutional malice principle, so carefully refined over the years, should not become a paper tiger. Plaintiff should not be allowed to trample on the constitutional rights of freedom of speech and freedom of religion.

When *McNair I* extended the protection of the constitutional malice rule to religious speech, it also imported the large body of law delineating the constitutional malice principle, a body of law that emanates from *New York Times Company v. Sullivan,*

376 U.S. 254 (1964). Nonetheless, *McNair II* has refused to apply this body of constitutional law properly to the facts before it, even assuming that the *McNair II* court was not bound by the holding of *McNair I* on the sufficiency of the evidence.

Constitutional malice involves a person's actual state of mind with respect to the truth or falsity of what he has said or written. It is the person's actual state of mind, rather than any constructive state of mind, that must be examined. *Garrison v. State of Louisiana,* 379 U.S. 64 (1964). To be constitutionally malicious, a defendant must in fact entertain serious doubts as to the truth of his publication. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). Generally, a finding of constitutional malice may not be based upon inadequate investigation of the facts. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967).

California decisions are in accord with those of the Supreme Court of the United States. Regardless of the defendant's attitude toward the plaintiff, the sole issue as to constitutional malice is his state of mind with respect to the truth or falsity of what was said or written. *Heritage Publishing Company v. Cummins,* 124 Cal.App.3d 305 (1981); *Reader's Digest Association v. Superior Court,* 37 Cal.3d 244 (1984); *McCoy v. Hearst Corporation,* 42 Cal.3d 835 (1986).

The *McNair II* court has held that a trier of fact could believe that the plaintiff was truthful in denying what was said about her; that witnesses with contrary testimony must therefore be deemed untruthful; that a witness who is untruthful in part of his testimony may be disbelieved in all of his testimony; and that the defendants were therefore guilty of constitutional malice. (*McNair II,* pages 28-32.) This line of reasoning is not

only preposterous, making a mockery of the constitutional malice principle, but has been specifically rejected by the Supreme Court of the United States. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986). See also, *McCoy v. Hearst Corporation*, 42 Cal.3d 835, 845-846 (1986) (*McCoy I*).

In *Bose Corporation v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court of the United States explained the proper role of appellate courts in constitutional malice cases, as follows:

> "The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " 466 U.S. at 510-511.

The *Bose* court also noted that, if the testimony of a witness is not believed, "the trier of fact may simply disregard it." 466 U.S. at 512. However, the discredited

testimony normally "is not considered a sufficient basis for drawing a contrary conclusion." 466 U.S. at 512.

McNair II simply disregarded the teaching of the *Bose* case as well as the holding of another decision of the highest court of the nation, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Like *McNair II*, *Anderson* was decided in the context of review of a summary judgment. The high court firmly rejected the contention that "the defendant should seldom if ever be granted summary judgment, where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." 477 U.S. at 256. Rather, in order to defeat a motion for summary judgment, a plaintiff in a case who is required to prove constitutional malice must present clear and convincing evidence that might support a finding of constitutional malice. 477 U.S. at 257.

In *McCoy I*, this court adopted the approach of *Bose* and *Anderson* the constitutional malice issue. *McCoy I* was cited to the *McNair II* court, but to no avail.

The *McNair II* court attempts to distinguish this court's decision in *McCoy I* on the ground that the defendants in *McCoy I* had no "motive" with respect to the plaintiffs, but were simply disinterested journalists. This purported distinction illustrates that the *McNair II* court confused the defendants' state of with respect to the plaintiff with their state of mind concerning what was said and written. Constitutional malice concerns only the latter. *Reader's Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984); *Fletcher v. San Jose Mercury News*, 216 Cal.App.3d 172, 185-186 (1989); *Widener v. Pacific Gas and Electric Company*, 75 Cal.App.3d 415, 434 (1977). Furthermore, McNair II represents a misunderstanding of the concept of "motive."

A "motive" is a "cause or reason that moves the will and induces action." *Black's Law Dictionary,* 6th Edition, page 1014. "Motive is an idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion." *People v. Gibson,* 56 Cal.App.3d 119, 129 (1976).

One does not have a "motive" to believe or disbelieve something. Rather, belief is the result of faith, reason, and evidence. The legal concept of "motive" relates to action, not to belief. Thus, the refusal of the *McNair II* court to follow *McCoy I* was clearly erroneous.

A recent federal constitutional malice decision illustrating the irrelevance of motive is *Reuber v. Food Chemical News, Inc.,* 925 F.2d 703 (4th Cir. 1991). In *Reuber,* in taking away a large judgment for want of constitutional malice, the Fourth Circuit rejected the approach of *McNair II* with regard to a defendant's motivation. In particular, the court found it irrelevant that one of the defendants "had a strong incentive to harm Reuber's professional reputation." 925 F.2d at 715. Moreover, an economic incentive on the part of one of the defendants, "a profit motive," was similarly found irrelevant to the constitutional malice issue. 925 F.2d at 715-716.

The cornerstone of *McNair II* is the proposition that, through a chain of inferences, constitutional malice may be inferred from a possible finding of lack of credibility on the part of defendant Roderick C. Meredith. This reasoning is constitutionally impermissible. "[A] determination of actual malice [constitutional malice] cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial." *Newton v. National Broadcasting Company,* ___ F.2d. ___ (9th Cir. 1991), amended opinion filed April 5, 1991, reported

in the *Los Angeles Daily Journal, Daily Appellate Report,* on April 8, 1991, pages 3945, 3948.

The *Newton* case simply cannot be distinguished from *McNair II. Newton* holds that, as a matter of law, constitutional malice may not be inferred from lack of credibility on the part of a defendant, while *McNair II holds to the contrary. Newton* is, of course, consistent with federal and state constitutional malice decisions, while *McNair II* is a lawless aberration.

McNair II makes the serious mistake of lumping together all of the sources that defendant Roderick C. Meredith relied upon, failing to distinguish those statements based on personal observation from statements based on or confirmed by independent sources. However, when the actual declaration of Dr. Meredith is examined, it appears quite clearly that certain statements were based on personal observations, which statements were never directly contradicted even by Leona McNair. Other statements were based on sources, comments made by close relatives, which Dr. Meredith had no reason to disbelieve.

If the declarations in support of and in opposition to the defendants' motion for summary judgment are read together, as a whole, in the manner required by the *McCoy I* decision, it is obvious that the purported conflicts in the evidence are insignificant. There is certainly nothing that constitutes clear and convincing evidence of constitutional malice on the part of defendant Meredith.

The key source of apparent discrepancies in the evidence concerns the timing of the McNair divorce. The plaintiff simply assumes that the time of a divorce is the time that one of the parties to a marriage files a petition in a civil court seeking dissolution of that

person's marriage. Other people might think that the time of a divorce is the date of an interlocutory or final decree. However, from the record as a whole, it is obvious that defendant Meredith was concerned with the validity of the ecclesiastical divorce, and the time of the McNair divorce may have been the time that the Worldwide Church of God found the civil divorce to be valid in the eyes of the Church.

The issue Dr. Meredith addressed was the controversy over the Church's doctrinal issue of divorce and remarriage. Leona admitted that this was the issue that was addressed. It was not the doctrinal issue of "filing a petition for dissolution." Hence it is obvious that the relevant time period in Dr. Meredith's mind was not the date the petition for divorce was filed, but rather the date of Mr. Raymond McNair's divorce becoming final, at the very earliest. Hence all the facts occurring during the McNair marriage to that date were relevant, in Dr. Meredith's mind, to the issue he had to address.

Even Leona McNair acknowledges that there was a factual basis for the comments made about her if reference is made to the time frame between the filing of the divorce petition and the time that there was ecclesiastical recognition of the propriety of the divorce. Thus, the effort to find constitutional malice in the mind of defendant Meredith must fail, when one examines the record as a whole, and realizes that Dr. Meredith meant one point in time when he referred to the timing of the McNair divorce, while Leona McNair conceived the time of her divorce to be a different, and earlier, point in time.

When the record of the present appeal is viewed properly, as a whole, as required by *McCoy I* and other constitutional malice cases, it is quite clear that plaintiff

Leona McNair has no right to recover. "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." *McCoy v. Hearst Corporation,* 227 Cal.App.3d 1657, 1661 (1991) (*McCoy II*). The *McNair I* court generously allowed the plaintiff the opportunity to present any newly discovered evidence of constitutional malice, or any evidence that she already had but had not produced, since she had not been required to come forward with it. No new evidence has been offered. The requirement of proof of constitutional malice by clear and convincing evidence has not been satisfied. *McNair II* should have adhered to *McNair I,* just as *McCoy II* adhered to *McCoy I.*

If *McNair II* has been correctly decided, the constitutional malice rule has been emasculated. Every plaintiff in a defamation case claims that what was said or written about the plaintiff was untrue. If the trier of fact finds the statement untrue, he or she can thereby infer constitutional malice, according to *McNair II,* removing any constitutional restrictions that protect religious and political expression.

A fair examination of the record, faithful to the constitutional principles developed by the Supreme Court of the United States and by other appellate courts, shows that the defendants are entitled to judgment. There is no evidence of constitutional malice, certainly no clear and convincing evidence, as the court held in *McNair I.* The Court of Appeal, in *McNair II,* should not have departed from *McNair I."*

The federal question in issue in this case was timely

and properly raised in the petition for review filed, on May 6, 1991, by Leroy Neff, as Executor of the Estate of Herbert W. Armstrong, Robert McNair and Roderick C. Meredith, in pertinent part as follows:

> **"THE COURT OF APPEAL ERRED BY INFERRING A TRIABLE ISSUE OF FACT ON CONSTITUTIONAL MALICE FROM NOTHING MORE THAN THE ALLEGED FALSITY OF THE STATEMENTS UTTERED. GIVEN THAT SUMMARY JUDGMENT IS THE FAVORED REMEDY WHERE FIRST AMENDMENT RIGHTS ARE AT STAKE, IT SHOULD HAVE UPHELD THE LOWER COURT'S RULING.**

The test for constitutional malice in this context is the defendant's subjective attitude toward the truth of the allegedly defamatory utterance, not the truth of the utterance itself. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731-733.) Unless the defendant acted with a deliberate or reckless disregard for the truth, the utterance—even if untrue—is not actionable as libel or slander. (*New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 279-280; *McNair I, supra,* at p. 377.) Since First Amendment rights are at stake, this court has held that summary judgment, with the possibility of immediate appellate review on a petition for writ of mandate, is the "favored remedy" to determine as expeditiously as possible whether the plaintiff has a case worthy of submission to a jury. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 252.) The plaintiff has a "heavy burden" to resist summary judgment in this context. (See *Miller v. Nestande* (1987) 192 Cal.App.3d 191, 197.) The unacceptable alternative would be to force the defendant to choose between the

exercise of First Amendment rights and the possibility of long and costly but nevertheless meritless litigation.

Whether an inference of deliberate or reckless disregard for the truth is permissible from the mere falsity of the statement uttered will depend on the facts. " 'Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times, Butts, Gertz,* and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material.' " *(Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 513.) Conceivably, such an inference might be permissible "when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." (*Time, Incorporated v. Pape* (1971) 401 U.S. 279, 285.)

In *McNair II,* the Court of Appeal held the declarations defendants submitted, which included Meredith's declaration that he believed in the truth of what he said and wrote about Leona, shifted the burden to Leona to establish a triable issue of fact on the issue of constitutional malice. (Slip opn. p. 28.) However, the court held Leona met that burden. The court reached this conclusion based on the following reasoning: Meredith based his statements in part on his own observations. Leona said the statements were false. If the statements were false, then a jury might infer Meredith could not have believed they were true and must have uttered them with deliberate or reckless disregard for the truth.

The reasoning is flawed. A crucial but mistaken assumption appears to be that Meredith based what he said and wrote *on his own observations* of facts which

Leona alleges were not true: "Because Meredith claimed his belief in the truth of his own observations . . ., plaintiff's denial of the truth of those statements raised a reasonable inference that the declarations filed in support of defendants' motions were false." (Slip opn. p. 29; see also slip opn. p. 30 ["he also relied upon his own observations"], p. 33 ["his defamatory allegations were based on his own personal observations"].)

In his declaration Meredith made no such claim of personal observation with respect to any of the allegedly false and defamatory statements in this case. In paragraphs 20 and 21 of his declaration, Meredith stated what he relied on:

> ". . . [E]ye witness accounts from my sons, who were over at the McNair home often while the marriage was breaking up, describing many of the incidents which I mentioned in my statements; indeed, Leona's own sons confirmed many of these incidents to me. Other significant factors on which I based my belief were: my own personal conversations with Leona; the reports I received from my wife after she had talked with Leona or visited her home; and the reports I received from many other longtime ministers and faithful members of the Church whom I knew to be honest and trustworthy. [¶](21) I did not tell Mr. McNair beforehand that I was going to address his divorce at the January, 1979, ministerial conference. I did, however, show him the article I had written for the *Pastor's Report* before it was published. He read it over and told me that my statements were accurate." (C.T. pp. 5229-5230.)

Earlier in his declaration, Meredith referred to the "considerable marital difficulties" between Leona and McNair which he witnessed *after* his return from England, Leona's "bitter[ness] against the Worldwide Church of God," and her "very derogatory statements concerning the Church, Mr. Herbert Armstrong and Garner Ted Armstrong." (C.T. p. 5224.) He also described an instance when Leona sought derogatory information from him about Garner Ted Armstrong for use by a dissident publication called the *Ambassador Report*. (C.T. p. 5226.)

But none of these statements was disputed as false in Leona's opposing declarations, hence no inference of deliberate or reckless disregard for the truth was possible. To the contrary, Leona herself stated in a declaration with respect to her marital difficulties that after McNair had filed for a divorce, at a time when they were still living under the same roof, "our relationship became so acrimonious that we did not sleep together, or eat meals with one another." (C.T. p. 5770.) She added "[t]he allegations that I refused to civilly communicate with my husband and refused to sleep with him are untrue to the extent that they make reference to that period of time prior to the date when Raymond McNair filed a petition for dissolution of marriage." (C.T. p. 5770.) By implication, Leona *did cease* to civilly communicate with her husband after the divorce proceedings began, *by which time Meredith had returned from England.* That was all Meredith claimed in his declaration he witnessed.

With regard to Leona's attitude toward the Church, she stated in a declaration "[t]he only thing I ever did which might have been considered antagonistic to the church was to state my own personal belief to my

husband that the *church was corrupt in its financial dealings* and that it was carrying on *acts of immorality within the upper echelons of the ministerial hierarchy."* (C.T. p. 5769, emphasis added.) Again, this was just the type of derogatory statement by Leona about the Church and its leadership which Meredith claimed in his declaration to have witnessed.

Finally, with regard to the *Ambassador Report* incident, Leona never denied the truth of what Meredith said happened. Accordingly, no adverse inference about Meredith's state of mind could be drawn.

Meredith did not claim his declaration to have personally witnessed any of the other conduct by Leona to which he referred in the allegedly defamatory utterances. Accordingly, it cannot be inferred from Leona's simple denial of such conduct that if Meredith was mistaken in what he spoke or wrote about her, it was with a deliberate or reckless disregard for the truth. It was based on what he was told by others.

Nor can such an inference be drawn even if the sources of information on whom Meredith relied, i.e., Leona's sons, his own sons and McNair, among others, were false in what they reported. Where constitutional malice is the standard, it is the *defendant's subjective state of mind* which is the focus of inquiry. (See *Newton v. National Broadcasting Co.* (9th Cir. Apr.5, 1991) ___ F.2d ___ [91 Daily Journal D.A.R. 3945, 3947].) Unless the evidence shows the defendant knew his sources of information were untruthful or not worthy of belief, there is no triable issue of liability. (See *St. Amant v. Thompson, supra,* 390 U.S. at pp. 732-733.)

There is no such evidence in this case. The Court of Appeal's elaborate discussion of the right of a jury to disbelieve a witness' testimony misses the point. The

law is well established that disbelief of a defendant's assertion of a good faith belief in what he said is alone no basis for a finding that the defendant spoke with deliberate or reckless disregard for the truth. (See *Bose Corp. v. Consumers Union of U.S. Inc., supra,* 466 U.S. at p. 512.) Unless the plaintiff responds with *affirmative* evidence to support such a finding clearly and convincingly, there is a failure of proof. *(Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 256-257.) Contrary to what the Court of Appeal implies at pages 30, 31 and 32 of its opinion, the factual nexus is missing to link the alleged falsity of what Meredith said and wrote about Leona to a deliberate or reckless disregard for the truth.

The Court of Appeal itself may have sensed that missing link in its reasoning when it intimated that if Meredith had a motive to protect McNair then that might be enough to get to the jury under the clear and convincing evidence standard of proof, so long as Leona denies the truth of the utterances. (Slip opn. pp. 31-33.) Such an intimation is incorrect.

In *Harte-Hanks Communications, Inc. v. Connaughton* (1989) 491 U.S. 657 [105 L.Ed.2d 562, 575, 109 S.Ct. 2678, 2684], the Supreme Court cautioned "a newspaper's motive in publishing a story . . . cannot provide a sufficient basis for finding [constitutional] malice." Nor is proof of ill will or malice in the ordinary sense of the word sufficient. *(Id.*, at p. ___ [105 L.Ed.2d at p. 576, 109 S.Ct. at p. 2685.) Though such evidence may be relevant to the inquiry, "courts must be careful not to place too much reliance on such factors . . . ." (*Id.*, at p. ___ [105 L.Ed.2d at p. 577, 109 S.Ct. at p. 2686]; see also *Reuber v. Food Chemical News, Inc.* (4th Cir. 1991) 925 F.2d 703, 715-716 [defendant's

motivation insufficient to show constitutional malice].)

The same is true here. Assuming for sake of argument that Meredith had a motive to protect Raymond McNair against accusations of adultery, that is not enough to prove he actually said and wrote what he did with a deliberate or reckless disregard for the truth. To prove that, Leona was required to come forward with affirmative evidence of constitutional malice. *(Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. at pp. 256-257.) In the absence of such evidence, the trial court was correct to grant summary judgment."

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 20, 1991, I served the within *Appendices To Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Washington, D.C. 20543
(By Express Mail: original and forty copies)

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Clerk of the Superior Court
for the County of Los Angeles
for the
Honorable Richard A. Lavine
111 North Hill Street
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Clerk, California Court of Appeal
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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)